SUPREME COURT, U. S.

DEC 4 1974

MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-702

HAROLD R. SWENSON, Warden,
Missouri State Penitentiary,
Petitioner,

vs.

ALAN DANIEL WILWORDING,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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Comes now the petitioner, Harold R. Swenson, Warden, Missouri State Penitentiary for Men at Jefferson City, Missouri, and through his Attorney of Record, seeks a Petition for Writ of *Certiorari* to the United States Court of Appeals for the Eighth Circuit and would state and allege in the following particulars, to-wit:

OPINIONS BELOW

In *Wilwording* v. *Swenson,* 404 U.S. 249 (1971), this Court reversed the judgment of the United States Court of Appeals for the Eighth Circuit in *Wilwording* v. *Swen-*

son, 439 F.2d 1331 (8th Cir. 1971), and remanded the case for further proceedings. Ultimately, the United States District Court for the Western District of Missouri, Western Division, Honorable William H. Becker Chief Judge, issued its Findings of Fact, Conclusions of Law, and Final Judgment, denying the respondent Wilwording relief. *Wilwording* v. *Swenson*, Civil Action No. 18049-3 (Western District Missouri, December 4, 1973) (Appendix A). On September 10, 1974, the United States Court of Appeals for the Eighth Circuit filed an opinion in *Wilwording* v. *Swenson*, No. 74-1071 (8th Cir. September 10, 1974) (Appendix B), in which the judgment of the District Court was reversed and the cause remanded. Petitioner's Petition for Rehearing or in the Alternative for a Transfer to the Court *en Banc* filed in *Wilwording* v. *Swenson*, No. 74-1071 (8th Cir. September 10, 1974), on or about September 20, 1974, was denied on October 1, 1974.

JURISDICTIONAL STATEMENT

The respondent filed a petition for a writ of *habeas corpus* pursuant to 28 U.S.C., Section 2254 (1970) in the United States District Court for the Western District of Missouri, Western Division. From a denial of any relief under the petition, the respondent appealed to the United States Court of Appeals for the Eighth Circuit which remanded the cause to the District Court on September 10, 1974, with directions.

Jurisdiction is conferred upon this Court by the provisions of 28 U.S.C., Section 1254 (1970), in that this petition is sought within ninety (90) days from the filing of the opinion below and is, therefore, timely under the provisions of 28 U.S.C., Section 2101 (1970).

QUESTIONS PRESENTED

1. Did the United States Court of Appeals for the Eighth Circuit err in construing the respondent's complaint as stating a cause of action in federal *habeas corpus* to recover the loss of good time?

2. Did the United States Court of Appeals for the Eighth Circuit err in holding that the dismissal with prejudice on the motion of the respondent and his counsel in a connected action under Section 1983 of 42 U.S.C., of the respondent's "duration of confinement" claims was not a decision on the merits as to those claims when they were raised by the respondent in a separate action, which latter action the respondent claims is in federal *habeas corpus?*

3. Did the United States Court of Appeals for the Eighth Circuit err in holding that, in effect, the normal principles of *res judicata* and collateral estoppel do not apply in an action characterized as one in federal *habeas corpus,* essentially seeking relief from conditions of confinement, so as to permit the respondent to relitigate in *habeas* issues decided adversely to him in a Civil Rights action under Section 1983?

4. Did the United States Court of Appeals for the Eighth Circuit err in holding that the respondent had exhausted his state remedies with regard to the alleged "duration of confinement" claims where this Court has definitively construed the very same petition as not raising any such claims?

STATUTORY PROVISIONS INVOLVED

Twenty-eight U.S.C. 1291 (1970), in pertinent part, provides:

> "The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. . . ."

Twenty-eight U.S.C. 2253 (1970), provides:

> "In a habeas corpus proceeding before a circuit or district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit where the proceeding is had.
>
> "There shall be no right of appeal from such an order in a proceeding to test the validity of a warrant to remove, to another district or place for commitment or trial, a person charged with a criminal offense against the United States, or to test the validity of his detention pending removal proceedings.
>
> "An appeal may not be taken to the court of appeals from the final order in a habeas corpus proceeding where the detention complained of arises out of process issued by a State court, unless the justice or judge who rendered the order or a circuit justice or judge issues a certificate of probable cause."

Twenty-eight U.S.C. 2254 (1970), provides:

> "(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an

application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

"(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

"(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

"(d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit—

"(1) that the merits of the factual dispute were not resolved in the State court hearing;

"(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

"(3) that the material facts were not adequately developed at the State court hearing;

"(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

"(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

"(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

"(7) that the applicant was otherwise denied due process of law in the State court proceeding;

"(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determi-

nation, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

"(e) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

"(f) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding."

STATEMENT

On January 28, 1970, the respondent filed what purported to be a petition for a writ of *habeas corpus* in the United States District Court for the Western District of Missouri. The document filed by the respondent is of essential importance in this case and is reproduced herein as Appendix C. Civil Action No. 18049-3 was assigned to

the cause and the District Court filed its order on March 11, 1970, dismissing the "petition" without prejudice for failure to exhaust state remedies. The respondent then appealed to the United States Court of Appeals for the Eighth Circuit and No. 20,264 was assigned to the appeal. The Court of Appeals affirmed the lower court's disposition. *Wilwording* v. *Swenson,* 439 F.2d 1331 (8th Cir. 1971). However, on *certiorari,* this Court reversed and remanded the case "for further proceedings consistent with this opinion." *Wilwording* v. *Swenson,* 404 U.S. 249, 252 (1971), indicating that the respondent's "petition" should be considered as a complaint under 42 U.S.C., Section 1983 (1970). In turn, the Court of Appeals remanded the case to the District Court which continued to use Civil Action No. 18049-3. On December 4, 1973, the District Court entered its "Findings of Fact, Conclusions of Law and Final Judgment Denying Relief and Judgment for Respondent" in that action.

Upon remand, the District Court had before it the same "Petition for Writ of Habeas Corpus" (Appendix C) which it had previously dismissed for failure to exhaust state remedies and, therefore, seemingly decided to consider the "petition" as a 1983 complaint, consistent with this Court's *Wilwording* opinion. On May 11, 1972, the District Court issued an "Order Directing Petitioner to Show Cause Why Petition for Writ of Habeas Corpus Should not be Dismissed." In that order, it was stated:

> "The petitioner's contentions herein with regard to the conditions of his confinement may have been fully tried and decided adversely to petitioner in *Wilwording* v. *Swenson,* Civil Action Nos. 1490 and 1492 (June 28, 1971)...."

The two actions referred to in the above order were brought by the respondent under Section 1983 and decided

adversely to him. The Eighth Circuit Court of Appeals denied the respondent leave to appeal *in forma pauperis* from the adverse determination in those cases and this court denied the respondent's petition for a writ of *certiorari* in connection with those cases. *Beishir* v. *Swenson*, 407 U.S. 922 (1972). Thus, the District Court ordered the respondent to show cause why his claims in Civil Action No. 18049-3 were not *res judicata*.

Thereafter, the parties filed various pleadings and briefs with regard to the factual allegations made by the respondent and the effect of the prior judgment in Case Nos. 1490 and 1492 on the action in question. Finally, the "petition" was again denied by the District Court without a hearing and with prejudice. For doing so, the District Court gave alternative reasons: (1) that all the issues in Civil Action No. 18049-3 had previously been litigated by the respondent in Case Nos. 1490 and 1492, decided adversely to him, and were therefore *res judicata*; (2) that, treating the action as one for a writ of *habeas corpus*, all of the respondent's claims were moot; (3) that, if the normal rules of *res judicata* were not applicable to respondent's "good time" and expungement claims, he had failed to exhaust his state remedies; and (4) that the prior determination of the same factual issues was entitled to controlling weight even if the action is considered to be one in *habeas* (Appendix A).

The respondent appealed to the United States Court of Appeals for the Eighth Circuit and on September 10, 1974, in No. 74-1071, that Court reversed the judgment of the District Court and remanded the case with directions "that the petitioner [the respondent herein] be granted an evidentiary hearing as to his claim relating to the loss of good time which allegedly was deprived him by a denial of due process of law." Page 13 of the Slip Opinion (App. B, *infra*, p. A59).

REASONS FOR GRANTING THE WRIT

1. The Eighth Circuit Court of Appeals erred in construing the respondent's Petition for Writ of Habeas Corpus as involving a claim relating to the loss of good time.

Upon remand from this Court, the District Court did not permit the respondent to amend his "Petition for Writ of Habeas Corpus." Thus, it is the very petition construed by this court in *Wilwording* v. *Swenson*, 404 U.S. 249 (1971) and the respondent's claims construed by the Court of Appeals are the same previously considered by this Court.

From the opinion of the Eighth Circuit Court it may clearly be seen that that court was disturbed by the fact that the District Court did not permit the respondent to amend his "petition." However, based upon the record, the petitioner asserts that it cannot be said that the District Court abused its discretion in that regard and, moreover, the respondent did not raise the District Court's refusal to permit him to amend the "petition" as a point of error on the appeal. The petitioner asserts that the District Court was well justified in not permitting the "petition" to be amended to include "duration of confinement" claims as the respondent failed to exhaust his state remedies with regard to such claims. The argument in that respect is set forth *infra*. It is only because the Court of Appeals was swayed by the refusal to permit an amendment to the "petition" that it is mentioned here.

As the District Court was considering the very "petition" previously considered by this Court and as the opinion of this Court in *Preiser* v. *Rodriguez*, 411 U.S. 475 (1973) was filed prior to December 4, 1973, the date on which the

District Court entered its findings, conclusions, and judgment in Civil Action No. 18049-3, the District Court had the benefit of this Court's further teachings with regard to the "petition" in this case. In the *Preiser* case, this Court stated:

> "But none of the state prisoners [including Wilwording] in those cases was challenging the fact or duration of his physical confinement itself, and none was seeking immediate or more speedy release from that confinement—the heart of habeas corpus. . . . In Wilwording, the prisoners' complaints related solely to their living conditions and disciplinary measures while confined in maximum security. . . . It is clear, then, that in all those cases, the prisoners' claims related solely to the States' alleged unconstitutional treatment of them while in confinement. None sought, as did the respondents here, to challenge the very fact or duration of the confinement itself. Those cases, therefore merely establish that a §1983 action is a proper remedy for a state prisoner who is making a constitutional challenge to the conditions of his prison life, but not to the fact or length of his custody. . . ."

On the appeal to the Eighth Circuit Court, the respondent agreed "to abandon as moot those claims relating to cruel and unusual punishment" and stated:

> "Thus, the issues presented by the Petition [sic] concerning denial of administrative due process and equal protection of law remain in the cause. . . ." (Respondent's Brief before the Eighth Circuit Court of Appeals at 85).

According to the respondent in his brief below, his "petition" alleged deprivation of those constitutional rights so as to result in the loss of "good time" and the possibility to

earn such "good time" (through blood donations and flood work) thus lengthening his time of imprisonment and that the "infractions" for which he was placed in maximum security impaired his parole possibilities. Therefore, the respondent abandoned every claim in his "petition" other than the "duration of confinement" claims. However, as this Court noted in *Preiser,* the "petition" construed by the *Wilwording* Court did not present claims "to challenge the very fact or duration of the confinement itself."

As noted, the Eighth Circuit Court of Appeals remanded this case, directing the lower court to hold an evidentiary hearing as to the respondent's claim in the "petition" which related "to the loss of good time."

Clearly, the Eighth Circuit Court of Appeals erred in construing the "petition" in this case as presenting a claim relating to "the loss of good time."

2. The United States Court of Appeals for the Eighth Circuit erred in holding that a voluntary dismissal of a claim with prejudice in a Section 1983 action does not amount to a determination of that claim on the merits.

Assuming that the "petition" in this case does raise "duration of confinement" claims, the District Court carefully demonstrated that the same claims were raised by the respondent in Civil Action Nos. 1490 and 1492, which as previously explained were actions under Section 1983 and were connected to the present action, and the respondent and the respondent's counsel voluntarily moved to dismiss such claims from the 1983 actions. The District Court also showed that the motion filed by the respondent and his counsel to dismiss such claims was granted and the claims were dismissed "with prejudice." As argued, the Eighth Circuit Court erred in holding that the

dismissal of those claims with prejudice was not a determination of the claims on the merits. There is no basis for the fear expressed by the Eighth Circuit Court that the respondent may not have known that the dismissal of those claims would be with prejudice. As the District Court noted the respondent was represented by counsel and it should not be presumed that his counsel was unaware of the fact that the motion would be granted "with prejudice" and failed to explain that to the respondent. Moreover, the Court of Appeals' fear in that regard obscures the legal issue.

The error committed by the Eighth Circuit with regard to the question of whether the dismissal with prejudice amounted to a determination on the merits seemingly arises from viewing a Section 1983 and a connected *habeas* action as emanating from two "causes of action." In fact, the respondent had but *one* cause of action with regard to his alleged "duration of confinement" claims—which arose when he allegedly lost "good" time—and *two* federal remedies: one an action under Section 1983 and the other in *habeas*. This Court recognized in *Wolff* v. *McDonnell*, 94 S.Ct. 2963 (1974) that "the validity of the procedures for revoking good-time credits" could be litigated in a Section 1983 action and appropriate remedies fashioned. The appropriate remedy, of course, in such an action would not amount to an order that the good time be restored but might enjoin a state from revoking good-time credits without, for example, affording the process due. Clearly, therefore, an inmate seeking to recover good-time credits may choose his remedy: a suit in *habeas* or under Section 1983. Or, he might choose both. If the "petition" in this case is construed as raising "duration of confinement' claims, the respondent obviously took the latter course. However, the petitioner asserts that in the legal

sense only one "cause of action"—loss of good time—was involved. Therefore, at least with regard to a loss of good-time claim, the familiar rule of judgments as follows is applicable:

> "It is clear that a stipulation of dismissal with prejudice, or, for that matter, a dismissal with prejudice at any stage of a judicial proceeding, normally constitutes a final judgment on the merits which bars a later suit in the *same cause of action*. . . ."

Astron Industrial Associates, Inc. v. *Chrysler Motors Corp.*, 405 F.2d 958, 960 (5th Cir. 1968) (emphasis added; citations omitted). *Lawlor* v. *National Screen Service Corp.*, 349 U.S. 322 (1955), cited by the Eighth Circuit Court, also supports that rule. *Id.* at 327.

There is no reason in the record in this case why the above rule should not apply as it normally does. The dismissal of respondent's "duration of confinement" claims out of the Section 1983 actions was made on his motion and on that of his attorneys. There is no basis in the record for believing that the respondent and his counsel were not aware or were not made aware that if the motion was granted it would be "with prejudice" and, thus, a final judgment on the merits as to the dismissed claims.

[It should be noted that at the time the District Court entered its findings, conclusions and judgment, the respondent had not narrowed his claims as he later did before the Eighth Circuit and, it is for that reason that the District Court had to go to such a great length in analyzing the record in Civil Action Nos. 1490 and 1492. Before the Eighth Circuit, the respondent did not contest any part of the District Court's analysis of the record in those two cases but relied solely upon the wording contained in the "petition." Therefore, it is unnecessary

for this Court to analyze the record in Civil Action Nos. 1490 and 1492 to rule upon the issues presented in this petition.]

3. The United States Court of Appeals for the Eighth Circuit erred in holding that the normal principles of res judicata and collateral estoppel were not applicable to this type of habeas case.

Based upon its determination that the dismissal with prejudice of the alleged "duration of confinement" claims out of the Section 1983 actions was a determination on the merits, the District Court applied the normal principles of *res judicata* and collateral estoppel to bar the respondent from relitigating those claims in *habeas*. The Eighth Circuit Court, relying upon precedent established by this Court in cases where a criminal conviction was under attack and life and liberty at stake, held that those principles do not apply in this type of *habeas* action.

Undoubtedly, "[c]onventional notions of finality" are inapplicable to the conventional *habeas* action. *Sanders* v. *United States*, 373 U.S. 1, 8 (1963). However, the *habeas* action under consideration and those of a similar vein have but minimal impact on "life or liberty" and there is clearly a basis for distinguishing such actions as this one, assuming it presents a "duration of confinement" claim, from *habeas* actions in which a criminal conviction is under attack. The District Court used that distinction for applying the normal principles of finality in this case and this Court has indicated its approval that such principles be applied in cases such as this. In *Wolff* v. *McDonnell*, 94 S.Ct. 2963 (1974), this Court foresaw the situation where a Section 1983 action would proceed to judgment before a connected *habeas* action was decided. In a footnote, this Court stated: "One would anticipate that normal

principles of *res judicata* would apply in such circumstances." *Id.* The circumstances envisioned by the *Wolff* Court are the circumstances in this case. The respondent's Section 1983 action, in which he raised his "duration of confinement" claims and then moved to dismiss them, resulted in a final judgment against him and a dismissal of those claims with prejudice. The District Court held that such a dismissal was a determination on the merits which was to be given a *res judicata* effect and the respondent therefore collaterally estopped from relitigating the claims. Assuming that the District Court properly held the dismissal of the claims to be a determination on the merits, the application of the conventional notions of finality is in accord with the indication provided in *Wolff*.

The compelling reasons for excepting conventional *habeas corpus* actions from the application of the conventional notions of finality do not exist for the type of *habeas* action under consideration. Common sense and practicality dictate that when a Section 1983 action is final, the issues actually litigated (or which should have been litigated or which by force of law are deemed to have been litigated) should also be considered finally decided so as to prevent their relitigation in *habeas*. This is especially true in light of this Court's opinions which indicate the overlap between the two federal remedies, *habeas corpus* and Section 1983. The United States District Court for the Western District of Missouri, to assure compliance with those opinions, has found it necessary to consider many *habeas* petitions both as such and as Section 1983 complaints and to consider Section 1983 complaints both as such and as *habeas* petitions. The District Court has therefore adopted the practice of docketing a complaint or a petition as two lawsuits. If, for example, the Section 1983 lawsuit proceeds to judgment, should the parties have to relitigate the same issues in the *habeas* lawsuit?

4. The United States Court of Appeals for the Eighth Circuit erred in holding that the respondent had exhausted his state remedies.

As previously indicated this Court interpreted the very "petition" which was before the Eighth Circuit Court and noted that the respondent was not challenging the duration of his confinement or seeking an immediate or quicker release from that confinement. Therefore, this Court's holding in *Wilwording* v. *Swensen, supra,* 404 U.S. at 250, that the respondent had exhausted his state remedies with regard to the allegations contained in the fourth "petition" cannot be interpreted as saying that the respondent exhausted those remedies with regard to claims challenging the fact or duration of his confinement. The respondent clearly has not demonstrated that he has exhausted such claims.

Surely, this Court would agree that in order to perceive a "duration of confinement" claim in the allegations contained in the "petition," a most strained interpretation of those allegations must be made. Under the circumstances of this case, it is unfair to the courts of the State of Missouri, and a violation of the exhaustion requirement, to hold that the respondent has exhausted his available state remedies as to such a claim.

Moreover, the petitioner demonstrated to the Eighth Circuit Court that the respondent has a declaratory judgment remedy available to him in the state court system to litigate his "duration of confinement" claims and that the respondent is quite familiar with that remedy and how it may be invoked. The essence of the documents filed by the petitioner to demonstrate that to the court below are included herein as Appendix D. The Appendix will demonstrate to this Court that the respondent filed a petition for a declaratory judgment in the Circuit Court

of Cole County, Missouri, regarding an alleged due process deprivation. He was permitted to proceed as a pauper in that lawsuit and was provided the representation of counsel without expense. The suit was tried before the court which entered its findings and conclusions, denying the respondent relief. Ultimately, the respondent was successful in obtaining an appeal from the judgment of the Cole County Circuit Court to the Missouri Court of Appeals, Kansas City District, where the appeal is presently pending. [It should be noted that the declaratory judgment action was filed by the appellant using an alias, Daniel A. Wilwerding.]

In sum, the respondent should be required to exhaust his adequate and available state remedies and the courts of the State of Missouri should be given a chance to rule on his "duration of confinement" claims.

CONCLUSION

For the above reasons, the petitioner prays that a writ of *certiorari* be issued to the United States Court of Appeals for the Eighth Circuit, and that this case be reviewed by this Court and that the judgment below be reversed.

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APPENDIX

APPENDIX A

IN THE
UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

Civil Action No. 18049-3

ALAN DANIEL WILWORDING,
Petitioner-Plaintiff,

v.

HAROLD R. SWENSON, Warden, Missouri State Penitentiary, Jefferson City, Missouri,
Respondent.

Findings of Fact, Conclusions of Law, and Final Judgment Denying Relief and Judgment for Respondent

(Filed December 4, 1973)

In this petition (subject to being read as a civil rights action under Section 1983, Title 42, United States Code), petitioner seeks to relitigate substantially the same claims for relief (from conditions of confinement) that were asserted by him in this Court, in two prior contemporaneous civil rights actions under Section 1983, Title 42, United States Code, filed and adjudicated adversely to him on the merits in 1971, after a full and fair trial on the merits. The adverse adjudication on the merits of the same claims for relief occurred while a petition for *certiorari* in this case was pending in the Supreme Court of the United States. Because of a lack of candor of petitioner's counsel, this

information was denied to the Supreme Court of the United States despite the doubt and dissent of Chief Justice Burger. The Supreme Court summarily reversed the judgment of the Court of Appeals affirming the original decision of this Court in this case, resulting in a remand for further proceedings. *Wilwording* v. *Swenson*, 404 U.S. 249, 92 S.Ct. 407, 30 L.Ed.2d 418 (1971).

The question presented now is whether a state prisoner can assert claims for relief contemporaneously in federal habeas corpus and in a civil rights action under Section 1983, Title 42, United States Code, and have a second trial on the merits of the same claims for relief after having previously suffered adverse judgments on the merits of the same claims for relief in the other civil rights actions under Section 1983.

In this opinion, it is concluded that a second trial on the merits of the same claims for relief is neither required or permissible.

All facts material to the decision in this case on the issue of former adjudication of the merits of this case, are found in abundance in the files and records of the earlier, fully adjudicated civil rights actions in *Wilwording* v. *Swenson*, Civil Actions Nos. 1490 and 1492 (W.D.Mo. 1971), wherein petitioner unsuccessfully asserted the same claims for relief in this district. The uncontroverted and uncontrovertible facts of record in these related actions in this district may be, and are judicially noted. *Shuttlesworth* v. *Birmingham*, 394 U.S. 147, 157, 89 S.Ct. 935, 22 L.Ed.2d 162, 171 (1969); *Bienville Water Supply Co.* v. *Mobile*, 186 U.S. 212, 217, 22 S.Ct. 820, 46 L.Ed.1132, 1134-1135 (1902); McCormick, *Evidence* 765-766 (2nd ed. 1972).

Petitioner, a state convict confined in the Missouri State Penitentiary, filed this action as a petition for writ of

habeas corpus on January 28, 1970. Therein, petitioner made the following allegations as grounds for relief in habeas corpus:

(1) "That the respondent is punishing petitioner without Due Process of Law for exercising his inherent right to petition the court of law for just redress";

(2) "That respondent [has] subjected this petitioner to cruel and unusual punishment in violation of the 8th Amendment of the United States Constitution";

(3) "That the respondent is now punishing petitioner for aiding and assisting other prisoners (on their request) relative to the preparation of civil complaints regarding the massive infliction of cruel and unusual punishment by the Missouri State Penitentiary officials";

(4) "That the respondent unjustly and falsely accused this petitioner of plotting to escape, [and of being an agitator] of a work strike . . . [and] the latter accusation was fabricated in retaliation for this petitioner's act of assisting other prisoners to prepare civil complaints against prison policy, to various courts of law";

(5) "That the respondent [has] inflicted cruel and unusual punishment upon the petitioner by means of a high pressure fire hose and chemical mace while the petitioner was locked secur[e]ly in his cell with seven other inmates who were causing no trouble and were utterly helpless";

(6) "That the respondent is presently forcing this petitioner to live under conditions that are hardly fit for human habitation and are extra punitive"; and

(7) "That the petitioner's institutional record has been greatly tainted by the respondent's false and unjust reports with absolutely no valid evidence to support said charges [and that this record adversely affects petitioner's] fu[r]ther parole consideration."

After processing the petition for habeas corpus herein, the entering of a show cause order, the filing of a response thereto by the respondent and a traverse thereof by the petitioner, this Court, on March 11, 1970, dismissed, for failure to exhaust state remedies, the petition to petitioner's remedies in the courts of the State of Missouri, stating in part, as follows:

"It is well established . . . that denial of a petition for habeas corpus by the Missouri Supreme Court for failure of petitioner to state a claim on which relief might be granted does not exhaust state remedies in habeas corpus. *Cox* v. *Nash,* (W.D.Mo.) 226 F.Supp. 87; *Russell* v. *Swenson,* (W.D.Mo.) 251 F.Supp. 196. As noted in *Cox,* dismissal in the Missouri Supreme Court for failure to state a claim may be for any number of reasons, including but not limited to, failure to set out the facts entitling the pleader to relief, or for failure to use the proper remedy in the state courts. Although it appears that habeas corpus could possibly be available in the courts of Missouri as a means of challenging conditions of confinement (See *Winford* v. *Wilkinson,* (W.D.Mo.) 288 F.Supp. 916), petitioner herein may have additional adequate remedies to enforce the respondent's statutory duty under the laws of Missouri not to impose cruel and unusual punishment under Section 216.450 RSMo by way of a petition for mandamus, injunction or other extraordinary relief in the courts of Missouri. A state prisoner's

> state remedies are not deemed exhausted so long as he may present the question in the state courts by 'any available procedure.' Section 2254, Title 28, U.S.C.; *Fay* v. *Noia*, 372 U.S. 391, 83 S.Ct. 822, 9 L.Ed.2d 837. And state remedies cannot be deemed exhausted for the purposes of federal habeas jurisdiction until by some means the petitioner has secured an adverse decision on the merits of his contentions from the Missouri Supreme Court. *Cox* v. *Nash, supra; Russell* v. *Swenson, supra.*"

The judgment of this Court was affirmed on appeal by the United States Court of Appeals for the Eighth Circuit. *Wilwording* v. *Swenson*, 439 F.2d 1331 (8th Cir. 1971). The Supreme Court of the United States, in *Wilwording* v. *Swenson*, 404 U.S. 249, 92 S.Ct. 407, 30 L.Ed.2d 418 (1971), reversed the judgment of the Court of Appeals and remanded this case ". . . for further proceedings consistent with [their] opinion." The Supreme Court held that it had not been demonstrated that any state remedies were available to petitioner in Missouri and that:

> ". . . although cognizable in federal habeas corpus, see *Johnson* v. *Avery*, 393 U.S. 483 (1969), petitioners' pleading may also be read to plead causes of action under the Civil Rights Acts, 42 U.S.C. § 1983, and 28 U.S.C. §§ 1343 (3) and 1343 (4), for deprivation of constitutional rights by prison officials . . . not subject, on the basis of their allegations, to exhaustion requirements." *Wilwording* v. *Swenson*, 404 U.S. 249, 251, 92 S.Ct. 407, 30 L.Ed.2d 418, 421 (1971).

Subsequently, on January 18, 1972, the case was remanded by the United States Court of Appeals for the Eighth Circuit to this Court for further proceedings consistent with the opinion of the Supreme Court.

On June 28, 1971, after the decision of the United States Court of Appeals for the Eighth Circuit affirming the judgment of this Court and before the briefing of this case in the Supreme Court of the United States,[1] the Honorable Elmo B. Hunter of this District, after trial on the merits, entered judgment denying equitable relief to petitioner in *Wilwording v. Swenson,* Civil Actions Nos. 1490 and 1492 (W.D.Mo. 1971), suits brought by petitioner as a civil rights action under Section 1983, Title 42, United States Code, and Section 1343(3) and (4) of Title 28, United States Code. In those cases, petitioner alleged two grounds for relief which were ruled adversely to him in the written judgment handed down on June 28, 1971, by Judge Hunter. Those grounds, as stated in the final judgment in that case, were as follows:

> "First . . . that he has been denied access to the Courts by defendants Swenson and Williams. As a second ground for relief . . . that his eight[h] amendment right to be free from cruel and unusual punishment was violated as a result of the prison administration's use of a fire hose and mace to quell a disturbance on June 29, 1969."

The pleadings filed by the petitioner in that case show that the above summary of petitioner's grounds for relief was accurate.[2]

With respect to the first ground for relief, Judge Hunter generally found that:

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1. According to the affidavit filed by counsel for petitioner in this case, briefing in the Supreme Court took place in October, 1971.

2. Very specific factual allegations of cruel and unusual punishment are set out in paragraphs 37 through 58 of Count I(e) in the amended complaint filed on March 3, 1971, in Civil Actions Nos. 1490 and 1492.

> ". . . plaintiff, Daniel Wilwording, has failed to sustain his burden of proof of persuading the Court by a preponderance of the credible evidence that he was denied access to the courts. His claim of denial of access to the Court is totally without substance or merit."

On the second ground for relief, it was generally found that the evidence, under applicable federal standards,[3] "clearly indicates plaintiff was not subjected to cruel and unusual punishment," and particularly that:

> ". . . the placement of plaintiff in a seclusion cell and exposure to chemical mace, after all lesser methods to regain control failed, does not constitute punishment of such character as to shock the conscience or be intolerable to fundamental fairness. Nor is this a case where a prisoner has been subjected to physical and mental abuse or corporal punishment disproportionate to the offense for which it was imposed. Likewise, it cannot be said that the defendants, in pursuit of a legitimate penal purpose, namely, to prevent spread of inmate rebellion and to restore order, used force beyond what was necessary to achieve that vital purpose. In the light of these tests there is no evidence to indicate the defendants' action was arbitrary, capricious or unreasonable. Confronted with riotous conduct likely to cause repercussions throughout the institution and after three days of flooding, burning and destruction of property, Warden Swenson and his staff identified the agitators and formulated a plan to segregate them from the other inmates. The agitators were searched and removed without the use of force and

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3. In denying petitioner leave to appeal in *forma pauperis* in an order entered December 6, 1971, the United States Court of Appeals for the Eighth Circuit stated that "[t]he trial judge has exhausted the law and properly applied it in this situation."

placed in seclusion cells with adequate clothing. The nutritional and hygienic needs of the inmates were satisfied during their confinement in the seclusion cells. It is not unreasonable, in a constitutional sense, to cause several persons to share the same cell for a short period of time in an emergency situation while attempting to make arrangements for additional space. Neither can it be said to be unreasonable to resort to the judicious use of mace to regain control and establish order after lesser means have failed. When the use of a fire hose failed to restore order it was no abuse of discretion or constitutional deprivation to advance to the next most severe nonlethal remedy. Hence, it is the Court's finding that there is no merit to plaintiff's contentions made as a part of his second ground for relief."

A comparison of the pleadings on which the judgment was based in Civil Actions Nos. 1490 and 1492 with those in this case conclusively shows that the judgment handed down by Judge Hunter on June 28, 1971, fully covered petitioner's allegations as are numbered (1), (2), and (5),[4] *supra*, and constituted a final adjudication[5] of those issues. Further, as indicated by the following summary, by virtue of a dismissal with prejudice entered in that case on April 8, 1971, on the motion of petitioner therefor, all of the other claims of petitioner raised in this case were fully and finally adjudicated.

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4. With respect to allegation (2), respecting "cruel and unusual punishment," it will be noted in this memorandum at a later point that petitioner's claims of cruel and unusual punishment, other than those taking place in June, 1969 (which were adjudicated in Civil Actions 1490 and 1492), were the subject of a judgment of dismissal with prejudice in those cases on April 8, 1971.

5. "[T]he cause of action is . . . barred by res judicata [if] there is a final determination on the merits." 1B *Moore's Federal Practice* ¶ 0.409[1], 1003 (2nd ed. 1965).

Petitioner's allegation (3), *supra*, was that he was being punished for rendering legal assistance to others. In Count IV(g), paragraph 67, of the second amended complaint in Civil Actions Nos. 1490 and 1492, petitioner made the following allegations:

> "On or about September 23, 1969, Defendant Williams[6] confronted Plaintiff Wilwording and threatened him with being returned to maximum security, from which he had just been released, if he aided or assisted any inmates with the preparation of any legal action against Penitentiary personnel."

In paragraph 68 of the same count, it was alleged that:

> "On or about November 23, 1969, Defendant Williams came to Plaintiff Wilwording's cell with three sub-

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6. It must be noted at this point that, technically speaking, only Count I was asserted in Civil Action Nos. 1492, while all other counts in the amended complaint filed March 3, 1971, were asserted in Civil Action No. 1490. But, since the cases were consolidated, all of the allegations of the amended complaint are herein spoken of as if they were raised in both actions. The fact that the claims of punishment for rendering legal assistance to others in Civil Actions Nos. 1490 and 1492 were made against Defendant Williams in that action and against defendant-respondent Swenson in the case at bar, does not destroy the effect of *res judicata* by the judgment of dismissal without prejudice entered on April 8, 1971. It is generally alleged in Civil Actions Nos. 1490 and 1492 that "[t]he administration and management of the Penitentiary was at all relevant times and is now included within Defendant Swenson's responsibilities" and that defendant Williams was "subject to the authority and direction of Defendant Swenson." "[W]hen B and X are both liable, if at all, on the basis of the same factual situation, and the liability of one of them is derived from the liability of the other because of some legal relationship between B and X, a judgment adverse to a claimant A in a suit against B, necessarily adjudicating that no primary liability toward A arose from the factual situation involved, ought to preclude A from retrying the same issues in a suit against X." 1B *Moore's Federal Practice* ¶ 0.412[3], 1817 (2nd ed. 1965). "Dismissal with prejudice, unless the court has made some other provision, is subject to the usual rules of res judicata and is effective not only on the immediate parties but also on their privies." 9 Wright and Miller, *Federal Practice and Procedure* § 2367, 186 (1971).

ordinates and ordered Wilwording to leave the cell and stand about twenty feet away. Defendant Williams searched Wilwording's cell and scattered his legal papers across the floor. Defendant Williams stuffed other legal papers down the commode and confiscated legal texts belonging to Wilwording which have never been returned to him. Defendant Williams then maced or gassed Wilwording in the face without provocation."

Paragraphs 75 and 76 of the same Count IV(g) alleged the following:

"Plaintiffs Beishir, Boedeker, Laster, Wilwording and Umfress have become 'jail house' lawyers. Defendant Swenson continues their confinement to punitive segregation because of their filing this and other suits on behalf of themselves and other inmates in order to impede access of plaintiffs and other inmates to State and Federal Courts. Further, Defendant Swenson continues the confinement of these plaintiffs to prohibit their association with other inmates and to prevent plaintiffs from filing post conviction remedies or other court actions on behalf of other inmates.

"There is not available to inmates of the Penitentiary adequate assistance from lawyers admitted to practice in Missouri, thereby making it essential that inmates of the Penitentiary have the services of other inmates more familiar with legal processes, remedies and the law, in order for such inmates to have reasonable access to the courts to litigate matters relating to the causes and conditions of their imprisonment."

On April 8, 1971, in both civil actions numbered 1490 and 1492, Judge Hunter entered an "order of dismissal," which stated as follows:

"On the oral motion of plaintiff, Daniel Wilwording, and by his attorneys, Willard Bunch, William Morgan and Jerry Walsh, Counts I(d), III(f), VI(i), *and IV, except for that portion of Count IV contained in numbered paragraph 66, of the second amended complaint in the above captioned cause are hereby dismissed with prejudice.*" (Emphasis added.)[7]

Petitioner's allegation No. (4), *supra,* was that petitioner was "falsely and unjustly" accused of plotting to escape. On March 3, 1971, in Civil Actions Nos. 1490 and 1492, petitioner filed his "second amended complaint," in Count I(d), paragraph 24 of which he alleged:

"On or about April 18, 1969, Plaintiff Wilwording was taken from the Penitentiary's general population and placed in the maximum security unit. He was informed only that this confinement was due to his alleged involvement in an unspecified plot to escape. In fact Plaintiff Wilwording was not involved in any alleged plot to escape and Plaintiff Wilwording was at no time given any indication of any other persons who were believed to be involved in the alleged plot or any additional information concerning any alleged plot. At no time prior to being placed in the maximum security segregation unit was Plaintiff afforded any type of an administrative hearing. About four days after plaintiff Wilwording had been so confined in maximum security, he was given a summary hearing before the Classification Committee but was provided with no additional information. No witnesses were heard at the hearing and no evidence was presented.

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7. Paragraph 66 alleged the destruction of a petition for a writ of habeas corpus by defendant Swenson on June 29, 1969. It was tried on the merits in Civil Actions Nos. 1490 and 1492 and determined adversely to petitioner.

> Wilwording was at such hearing 'classified' for placement in the maximum security unit and was returned there following the so-called hearing. Wilwording's placement and detention in maximum security were either directed by or done with the full knowledge and consent of Defendant Swenson, and Wilwording was held in maximum security on this occasion until September 23, 1969, when he was released back into the general population."

As noted above, the judgment of dismissal with prejudice entered by Judge Hunter on April 8, 1971, included all of Count I(d), in which was contained the allegation quoted above. (The complaint specifically defines Count I(d) as paragraphs 24 through 35.)

Petitioner's allegation No. (4) in this petition, *supra*, insofar as it alleges that a charge of agitation was fabricated against him as retaliation of respondent for petitioner's assisting others in the preparation of legal complaints, was asserted and adjudicated in Civil Actions Nos. 1490 and 1492. As noted above, paragraph 75 of Count IV(g) of the second amended complaint in Civil Actions Nos. 1490 and 1492, alleged that petitioner continued to be in "punitive segregation because of . . . filing this and other suits on behalf of [himself] and other inmates." Additionally, paragraph 25 of Count I(d), stated as follows:

> "On or about October 17, 1969, Plaintiff Wilwording was again taken from the Penitentiary's general population and on this occasion was placed in J Hall, a minimum security extra-punitive segregation unit. He was never informed why he was being confined in this segregation unit and at no time was he afforded any sort of an administrative hearing before being placed therein. Plaintiff Wilwording continues to be con-

> fined in said minimum security segregation unit to this date. Plaintiff Wilwording was placed there on the direct orders of Defendant Swenson and he has been held there since October 17, 1969, with the knowledge and consent of the said Defendants."[8]

As noted above, both of these allegations were dismissed with prejudice in Civil Actions Nos. 1490 and 1492, on the motion of petitioner and his counsel on April 8, 1971.

Petitioner's allegation No. (6), *supra*, in this case was that he was living under conditions "hardly fit for human habitation and . . . extrapunitive." In paragraphs 59, 60, and 61 of Count III(f) of the second amended complaint filed March 3, 1971, in Civil Actions Nos. 1490 and 1492, it was alleged that:

> "Maximum security was and is at all times mentioned in this Complaint an extra-punitive segregation unit where plaintiffs have been confined with the knowledge of Defendant Swenson for periods varying from a few days to in excess of two years (and apparently indefinitely).
>
> "Inmates confined to this unit must live under the specific conditions as described in paragraphs 17f and 34 and as hereafter further described. Plaintiffs Berry, Howard, Wilwording, Tyler and Westberg had to live . . . in these conditions which impose a life style of

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8. Later pleadings in the case at bar more completely identify the allegation of maximum security confinement from October 17, 1969, with the alleged charge of agitation. In paragraphs 21 through 27 of the petitioner's pretrial brief herein it is alleged that petitioner was initially, on or about October 30, 1969, committed to "J" Hall and then to maximum security on November 5, 1969, as an "agitator" of the work strike, and that he so remained under such commitment until February 12, 1971. Despite the minor and immaterial variations in dates and precise place of commitment, it is clear that the same disciplinary confinement is spoken of in both instances.

nearly total confinement in a space nine feet by six feet. Inmates in maximum security live with total dependency upon the whim of their keepers, without even the amenities of ordinary prison life. They were and are denied even minimal human interaction. The named plaintiffs are and were denied not only the normal range of human activity within the Penitentiary (such as all forms and manner of exercise and recreation) but were and are denied any program, opportunity or encouragement for any type of rehabilitation or treatment to assist them in realizing their potential for growth in order to become productive persons in society, prison or otherwise, one of the aims of penal confinement."

[Paragraphs 17f and 34 of the second amended complaint, as incorporated into the above paragraph by reference, allege respectively that:

"Maximum security segregation, an extra-punitive unit wherein inmates are classified as punishment for the infraction of institutional rules and regulations as a means of punishment and to segregate them from all other inmates. In contrast to the rights and conditions enjoyed by general population inmates, inmates confined in the maximum security unit are subject to more harsh and inhumane conditions and denial of rights as follows:

(1) Inmates are confined in their cells alone and are denied the right to freely associate with one another;

(2) Inmates are locked in their cells twenty-four hours per day and are denied the right to exercise, except for a few minutes each month;

(c) Cells in maximum security lack adequate ventilation; they lack adequate heat in the winter and are excessively hot in the summer;

(4) Inmates are subject to a continuous stench and foul odor emanating from the toilet facilities;

(5) Inmates may not have furniture in their cells;

(6) Inmates may not wear their own clothes;

(7) Inmates are served cold food and must eat within the confines of their cells; in addition they are denied condiments available to general population inmates;

(8) Inmates are allowed to shower and shave only twice a week;

(9) Inmates are denied the right to work or earn money;

(10) Inmates are denied the right to attend educational or vocational classes and are denied the right to take correspondence courses;

(11) Inmates are denied the use of a gym, athletic or recreational facilities of the Penitentiary;

(12) Inmates are not allowed to watch movies or television or listen to the radio;

(13) Inmates are denied access to the library and are denied reading materials except a very few magazines and newspapers to which they are able to personally subscribe;

(14) Inmates may not accumulate good time to the extent the general population inmates do and are subjected to losses of good time, thereby lengthening their sentences;

(15) Inmates may not earn good time by donating blood;

(16) Inmates are denied any rehabilitative opportunities, training, counseling or encouragement, thus greatly increasing their chances of recidivism."

* * *

"In addition to having been unjustly confined to the maximum security segregation unit or to some other extra-punitive unit, the Plaintiffs Wilwording, Beishir, Umfress, Boedeker, Howard, Stidham, Tyler and Berry have suffered an arbitrary and improper loss of the benefits of:

(a) three-fourths rule good time provided for by Statute in Missouri. . .

(b) institutional merit time . . . and

(c) blood time. . .

"Each of these three provisions provides a reduction of the sentence of an inmate and is not available to inmates who have been confined in maximum security or other extra-punitive units. Plaintiffs have been denied their rights to due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States by the actions of the defendants."]

"The named plaintiffs were and are subjected to indefinite confinement in maximum security and other punitive units and may be confined there at any time by Defendants Swenson, Wyrick, Lock and others for the sole purpose of punishment or retribution and not at all for the purposes of reformation or rehabilitation.

"During confinement in maximum security the named plaintiffs were and are subjected to abusive threats and harassment and indiscriminate beatings, gassings and other corporal punishment at the discretion and with the knowledge of Defendants Swenson and Wyrick thereby causing the named plaintiffs to constantly fear for their personal safety and their lives.

"During confinement in maximum security inmates, including the named plaintiffs, are forced to witness brutal beatings of helpless, unarmed inmates by groups of armed guards bearing clubs, blackjacks, shotguns and gas. They further must witness the anguish, cries, suicides and attempted suicides of mentally deranged inmates confined at close proximity to them. They are denied adequate medical treatment while in maximum security and Plaintiff Boedeker was informed by a prison physician that the medical care that he required would be impossible while he was confined in maximum security. All plaintiffs therein confined suffer continuous harassment, threats, insults, vituperations, denigration, physical and mental abuse and maltreatment in a variety of other forms, all at the hands of all defendants, and all with the knowledge and consent of Defendants Swenson, Lock and Wyrick."

By the order of dismissal entered April 8, 1971, in Civil Actions Nos. 1490 and 1492, all of Count III(f), which included paragraphs 59 through 64, *supra*, was dismissed with prejudice on the oral motion of petitioner and his counsel.

Petitioner's allegation No. 7, *supra*, was that his record has been "tainted with false and unjust reports." As noted above, paragraphs 24 and 25 of Count I(d) of the second amended complaint filed March 3, 1971, complained

of petitioner's having been placed in "punitive segregation" as the result of allegedly false accusations in May and October 1969. Additionally, paragraph 97 of that second amended complaint, based upon the allegations in those paragraphs, requested the restoration of all lost good time and "that the said defendant be directed to expunge the record of each plaintiff as to any such loss or denial of good time of any such unlawful punitive confinement." Count I(d) was wholly dismissed with prejudice by the judgment entered April 8, 1971, by Judge Hunter, on the motion of petitioner and his counsel.

Thus, it is apparent from the pleadings and the judgments entered in *Wilwording* v. *Swenson,* Civil Actions Nos. 1490 and 1492 (W.D.Mo. 1971) (fully accessible to the public, including counsel for petitioner, in the office of the Clerk of this Court) that, as of June 28, 1971, the issues raised in the petition at bar had been fully adjudicated adversely to petitioner. In fact, counsel for petitioner admittedly should have had even more ready access to the pleadings and judgments inasmuch as he concedes that he was a member of the same legal aid office as were counsel representing petitioner in Civil Actions Nos. 1490 and 1492. Furthermore, petitioner, as a sophisticated litigant, had personal knowledge of the pleadings and details of the litigation which were readily available to him and chargeable to his counsel. Nevertheless, when the issue was raised by respondent in the Supreme Court of the United States that these issues had been fully adjudicated, counsel for petitioner disclaimed knowledge on that issue on behalf of petitioner and himself. The report of the Supreme Court opinion notes as follows:

> "It appears that petitioners did seek relief under the civil rights statutes before filing their petitions below, and that these claims were denied after a hearing.

The dissent asserts that the petition for certiorari concedes 'that almost all of the claims involved in those actions underlie the *instant* habeas corpus proceeding.' (Emphasis supplied.) We are unable to find that concession in the petition. At page 11 of the petition the following does appear: 'Almost all of the complaints presented by [the earlier actions] had been raised in the habeas corpus petitions *originally filed in the State courts underlying this Petition.*' (Emphasis supplied.) Indeed, petitioners' counsel in his reply brief disclaims knowledge of what claims were presented in the cases, stating: 'As this writer did not participate as counsel in the Civil Rights Act cases and in view of the generalized nature of the claims for relief in the petitions herein, it is not known whether all of the issues intended to be presented by those petitions were presented in the Civil Rights Act cases.' Reply brief 7. Accordingly, we must conclude that it is not clear from the record whether the issues raised in the earlier cases are the same as those presented here. The effect, if any, of those actions upon the instant cases must therefore be determined on remand." *Wilwording* v. *Swenson*, 404 U.S. 249, 252, 92 S.Ct. 407, 40 L.Ed.2d 418, 422 (1971).

This quotation is marked by the evasion of the issues by petitioner's counsel which has persisted to this day.

After the remand of this case to this Court, on May 11, 1972, an order was entered directing petitioner to show cause why this action should not be dismissed, in which it was stated, in part, that:

"The petitioner's contentions herein with regard to the conditions of his confinement may have been fully tried and decided adversely to petitioner in *Wilword-*

ing v. *Swenson*, Civil Actions Nos. 1490 and 1492 (June 28, 1971). . . . In that case petitioner (plaintiff therein) sought damages and injunctive relief pursuant to § 1983, Title 42, United States Code, and declaratory relief under §§ 2201 and 2202, Title 28, United States Code. As grounds for relief, petitioner alleged therein that (1) he had been denied access to the Courts and (2) that his Eighth Amendment right to be free from cruel and unusual punishment was violated by the prison administration's use of a fire hose and mace to quell a disturbance in the Missouri State Penitentiary on June 29, 1969. After a full and fair trial, in which petitioner was represented by Court appointed counsel, the Court determined and adjudged that petitioner's claims for money damages and equitable relief were without merit and entered judgment for defendants.

* * *

"Because petitioner's factual and legal contentions in this cause appear to be identical to those presented by petitioner in Civil Action Nos. 1490 and 1492, which contentions were adjudged to be without merit, it is hereby

"ORDERED that petitioner show cause in writing on or before June 1, 1972, why this action should not be dismissed under the principles of *res judicata* and collateral estoppel and other principles of law and equity by stating facts in support of his claim for relief containing no color words, labels or legal conclusions and by stating in a separate section of his response to this order his legal contentions and authorities in support thereof."

Rather than respond to the show cause order, counsel for petitioner demanded that the Court "reconsider" the

issuance of the show cause order because requiring a response to it placed the burden of proof upon the petitioner (a contention patently without merit under the circumstances of this case[9]) and moved for the production of a non-existent and immaterial trial transcript in Civil Actions Nos. 1490 and 1492. It was only after those motions were denied[10] that counsel filed, on June 23, 1972, his response to the show cause order. In that response, petitioner and his counsel unequivocally contended that some four factual allegations were not considered by Judge Hunter in the civil rights cases. Those contentions, which are unfounded in fact, will be taken up in the paragraphs which follow.

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9. A former judgment may be introduced in evidence without a special pleading or motion asserting *res judicata*, 1B *Moore's Federal Practice* ¶ 0.408[1], 953 (2nd ed. 1965), and the court may take judicial notice of the prior judgment. *Holmes* v. *United States*, 231 F.Supp. 971 (N.D.Ga. 1964). Furthermore, the burden of proof shifts to the defendant if the issue was raised in the prior action and the former decision declares that all presented issues were decided. *Covey* v. *American Distilling Co.*, 132 F.2d 453 (7th Cir. 1943).

10. In denying the motion in the order entered herein on June 9, 1972, this Court stated as follows:

> "For good cause appearing from the files and records of this Court, in spite of the continuing calculated unwillingness of counsel for petitioner to inform himself of the proceedings in the companion case tried by Judge Hunter, the above-entitled motion [to reconsider order to show cause and to afford time for a transcript] will be denied, without prejudice to any contention regarding burden of proof and allowance of time to secure a transcript in the companion case. If counsel continues to try to obstruct framing of the issues in this case he will be replaced, so that the petitioner can have the adequate assistance of counsel. There is no place in this or any other case for a diversionary game of delay and impermissible tactics."

Counsel for petitioner, in an affidavit later filed by him herein, denied any diversionary tactics. But his prior and later performance in this case, as particularized later in this memorandum, do not support his protestations to that effect.

The Factual Allegations Respecting Petitioner's Commitment to Maximum Security, as Alleged, in April 1969

Petitioner contends, in his response of June 23, 1972, that the following "facts" were not considered in Civil Actions Nos. 1490 and 1492:

> "On or about April 18, 1969, petitioner was brought from 'general population' to the Maximum Security Unit of the Missouri State Penitentiary at Jefferson City, Missouri, where on or about April 22, 1969, he was brought before the prison Classification Committee and classified to the Maximum Security Unit without a hearing as a result of a letter from Administrative Assistant to the Warden, Mr. Donald Wyrick, accusing him of plotting an escape. He was to be incarcerated in the Maximum Security section of the Penitentiary for an indefinite period.
>
> "The party who was alleged to have plotted the escape with petitioner, Douglas Wayne Thompson, was also accused. However, unlike petitioner, he was accorded an opportunity to defend himself against the charge in an appearance before the 'Adjustment Board'.
>
> "Petitioner remained in maximum security until September 22, 1969, never receiving a hearing other than a reclassification hearing to maximum security during the months of May and July of 1969, or an opportunity to deny or dispute the charges—which he claims were unfounded. He was then released to general population. As a result of his incarceration in maximum security, he lost statutory 'good time' credit; the opportunity to earn industrial 'good time' and pay and the opportunity to earn 'flood' and 'blood time' credit. His institutional record was also marred by reflecting

the 'infraction', which record is available to the Missouri Board of Paroles and will influence his parole eligibility."

This statement reads almost exactly the same as paragraph 24 of Count I(d) of the second amended complaint filed March 3, 1971, in Civil Actions Nos. 1490 and 1492, which is noted above, *supra*, opposite petitioner's allegation No. (4) in the case at bar. As noted, the allegation was the subject of a dismissal with prejudice on April 8, 1971.

Apparently, even as of this late date, counsel for petitioner was elected not to take any notice of the files, records, pleadings and judgments in Civil Actions Nos. 1490 and 1492.

The Factual Allegations Respecting Petitioner's Alleged Commitment to Maximum Security Confinement in October and November 1969

In his response of June 23, 1972, petitioner and his counsel contended that the following factual allegations had not been considered by Judge Hunter in Civil Actions Nos. 1490 and 1492:

"On or about October 11, 1969, a 'sit-down strike' occurred at the Missouri State Penitentiary at Jefferson City, Missouri. All inmates of the institution were forthwith locked in their cells for approximately two (2) days, at which time each inmate was presented with a document for signature. Those who signed the document were released, but those who did not were kept locked in their cells.

"Petitioner advised the officials that he refused to sign the document in that it contained untrue admissions which he considered self-incriminatory, though he was willing to return to work. He was not released.

"On or about October 20, 1969, those who still refused to sign, including Petitioner, were transferred to 'J' Hall for continued confinement. Though Petitioner advised the guards of his willingness to work, he was not released.

"He was never brought before either the 'Adjustment Board', the 'Classification Committee' or any other administrative body for a hearing on his commitment to 'J' Hall. During his commitment period he was partially denied good time credit and opportunity, and his institutional record was affected in like manner to the effects claimed in part No. 1, *supra*.

"On or about November 5, 1969, Petitioner (again without an 'Adjustment Board' hearing) was brought before the 'Classification Committee' and told that he was being committed to maximum security indefinitely as an 'agitator' of the work strike. He was shown an interoffice communication from Lt. Tandy Williams accusing Petitioner of being an 'agitator', but he was not given an opportunity to defend against the charge. Petitioner denies having caused or 'agitated' the strike. He remained in maximum security until May 12, 1970, at which time, for reasons unknown to Petitioner, he was transferred to 'J' Hall, where he remained until his release to general population, February 12, 1971."

However, paragraph 25 of Count I(d) of the second amended complaint filed March 3, 1971, in Civil Action Nos. 1490 and 1492 (quoted in full hereinabove) effectively raised the issues of petitioner's confinement in maximum security from and after October 17, 1969, including the reasons for such confinement. That count was dismissed with prejudice by the order entered therein on April 8, 1971. If it is petitioner's contention, and that of his counsel, that the allegations concerning refusal to sign the "document"

and alleged consequent "lockup" are not placed in issue by that paragraph in the amended complaint in the former action, then it must be noted that those allegations cannot be deemed, by any fair construction of the petition herein, to have been raised in this case. In this case, petitioner only raised the "false accusation" of his being an "agitator" of a work strike. A comparison of the pleadings in Civil Actions Nos. 1490 and 1492 clearly shows that the alleged maximum security confinement from October 17 or 20, 1969, was because of that allegedly "fabricated" charge. The identity of those issues with those in the case is emphasized by petitioner's statement of his legal contentions in his pretrial brief filed on April 16, 1973, wherein the following is pertinently stated:

> "Petitioner was held in maximum security for four months for allegedly 'agitating' a peaceful work strike by inmates protesting conditions of confinement and work conditions though petitioner was willing to work at all times. The facts indicate that he was in fact punished for exercising his Fifth Amendment right against self-incrimination."

It should be noted here that matters that are concluded by a prior judgment include not only all matters actually litigated, but also all matters that should have been litigated in the prior action. *Partmar Corp.* v. *Paramount Pictures Theatres Corp.*, 347 U.S. 89, 74 S.Ct. 414, 98 L.Ed. 532 (1954), *reh. denied*, 347 U.S. 931, 74 S.Ct. 527, 98 L.Ed. 1083 (1954) and cases cited therein at 347 U.S. 89, 91 fn. 1, 98 L.Ed. 532, 537 fn. 1. *See also*, 46 *American Jurisprudence* § 417, 585-586 (2nd ed. 1969).

Contention that Judge Hunter Failed to Make Certain Findings on Issues Raised in Civil Actions Nos. 1490 and 1492 Respecting the Disturbance of June 1969

In his response of June 23, 1972, petitioner made the following contentions:

> "The opinion of Judge Hunter in the Civil Rights cases dealt exclusively with the issues presented by this point. It should be noted that the ruling fails to consider the claims of lack of medical attention and barring of access to the courts. Nor does the opinion attempt to distinguish between those prisoners making noise and those who were burning and flooding, though evidence was received on that point. The opinion also omits reference to evidence received concerning availability of virtually empty cells at the time of maximum overcrowding. The opinion fails to mention the difference in treatment accorded those signing the 'admission' form."

First, with respect to the claim of "lack of medical attention," it cannot be said that the petition in this case, under any liberal construction in petitioner's favor, raises this issue, except with respect to the general allegation of "cruel and unusual punishment."[11] On this issue, the clear finding of Judge Hunter in Civil Actions Nos. 1490 and 1492 was that no cruel and unusual punishment had been suffered during the period covered by this litigation. Further, in Civil Actions Nos. 1490 and 1492, the claim of lack of medical attention was clearly raised in paragraph 57 of Count II(e) of the amended complaint filed herein on March 3, 1971, wherein the following was alleged:

> "On or about June 30, 1969, the named plaintiffs asked to see a doctor to examine their eyes and body. This

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11. "[T]he *intentional* denial to a prisoner of *needed* medical treatment is cruel and unusual punishment." *Ramsey* v. *Ciccone*, 310 F.Supp. 600, 605 (W.D.Mo. 1970). "Lack of medical attention" does not, without more, state any claim of cruel and unusual punishment. See *Reynolds* v. *Swenson*, 313 F.Supp. 328 (W.D.Mo. 1970).

> medical attention was refused with the knowledge and consent of Defendant Swenson. A doctor did visit the named plaintiffs on or about July 9, 1969, but was unable to treat their eyes."

Judge Hunter found that petitioner did not sustain his burden of proving any denial of a federal right and specifically found that the ". . . hygienic needs of the inmates were satisfied during their confinement in the seclusion cells."[12] Certainly, this was a sufficient finding to resolve the factual issues. Furthermore, ". . . matters pertinent to an issue before a court and which were clearly presented to it . . . are to be taken as covered by the court's decision though not mentioned in the opinion." *Commonwealth of Pennsylvania* v. *Brown*, 373 F.2d 771, 777 (3d Cir. 1967), and cases cited therein. Even in the absence of a written opinion, the application of the doctrine of *res judicata* is not prevented. "The pleadings in the prior action are available to show what matters were in fact litigated and determined in the prior litigation." *Thomas* v. *Consolidation Coal Company*, 380 F.2d 69, 80 (4th Cir. 1967).

Second, the contention that Judge Hunter did not rule on the claim of denial of access to the courts is patently without merit. Judge Hunter clearly ruled that petitioner had ". . . failed to sustain his burden of proof of persuading the Court by a preponderance of the credible evidence that he was denied access to the courts." It is difficult to imagine how the finding could have been more clearly stated.

Third, petitioner contends that Judge Hunter failed to distinguish between ". . . those prisoners making noise and those who were burning and flooding, though evidence

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12. "Hygiene" includes by definition "conditions or practices . . . conducive to health." Webster's Seventh New Collegiate Dictionary 408 (1969).

was received on that point." In accordance with the authorities cited above, *Commonwealth of Pennsylvania* v. *Brown, supra*, and *Thomas* v. *Consolidation Coal Company, supra*, the fact that the issue was presented to Judge Hunter is sufficient to make his findings and judgment (that disproportionate punishment was not imposed) binding on the issue. It is readily apparent from Judge Hunter's findings that the making of noise by the prisoners contributed to the disorder which warranted the successive use of fire hoses and mace by the prison authorities.

Fourth, petitioner's contention that Judge Hunter did not consider, in his opinion, the alleged difference in treatment accorded to those who signed the "admission" form as compared to those who did not, is an irrelevant matter. As noted above, the allegations on which such considerations might have been based were dismissed with prejudice in Civil Actions Nos. 1490 and 1492 on April 8, 1971.

Conclusions of Law

It is apparent from the foregoing that all of the issues raised in the petition at bar have been *res judicata* since June 28, 1971, when Judge Hunter entered his final judgment in Civil Actions Nos. 1490 and 1492. It has often been ". . . held that under the doctrine of res judicata a judgment entered in an action conclusively settled that action as to all matters that were or might have been litigated or adjudged therein." *Partmar Corp.* v. *Paramount Theatres Corp.*, 347 U.S. 89, 90-91, 74 S.Ct. 414, 98 L.Ed. 532, 537 (1954), *reh. denied*, 347 U.S. 932, 74 S.Ct. 527, 98 L.Ed. 1083 (1954). "A final, valid determination is conclusive on the parties and those in privity with them as to the matters adjudged, or which should have been litigated, in another action or proceeding involving the same cause of action." 1B *Moore's Federal Practice* ¶0.405[3], 631-632 (2nd ed. 1965); 46 *American Juris-*

prudence § 417, 585 (2nd ed. 1969). A judgment after a trial on the merits is *res judicata*. 1B *Moore's Federal Practice, supra*. Therefore, the issues in this case which have been included in the judgment of June 28, 1971, entered by Judge Hunter in *Wilwording* v. *Swenson*, Civil Actions Nos. 1490 and 1492, are *res judicata*. The same is true with respect to those allegations which were dismissed with prejudice in the order entered by Judge Hunter on April 8, 1971. "Where, at any stage of the proceeding, there is for any reason a dismissal of the suit with prejudice, the dismissal normally amounts to a final judgment on the merits and bars a later suit on the same cause of action." 1B *Moore's Federal Practice* ¶0.409, 1008-1009 (2nd ed. 1965).

Further, as of June 28, 1971, when the final judgment was entered in Civil Actions Nos. 1490 and 1492, the issues herein were *res judicata*, even though then still subject to post-trial motions[13] and to appeal. See 1B *Moore's Federal Practice* ¶¶0.416[1], 0.416[3], 2203, 2252-2253 (2nd ed. 1965). And, at the present date, there can be no doubt respecting the finality of the judgment. After the entry of the judgment, the District Court entered an order on November 12, 1971, denying petitioner leave to appeal in *forma pauperis*, stating that:

> "Based upon an examination of the issues plaintiffs wish to raise on appeal in each of the nine cases [including Civil Actions Nos. 1490 and 1492], the Court is of the opinion the contentions are without legal or factual substance and are therefore frivolous."

Thereafter, on December 6, 1971, the United States Court of Appeals for the Eighth Circuit also denied petitioner leave to appeal in *forma pauperis*, stating:

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13. Restatement of Judgments § 41b (1942); *see also*, 1B *Moore's Federal Practice* ¶ 0.416[3] (2nd ed. 1965).

> "It is the judgment of the Court that these matters present questions of law which have been previously passed upon by our Court and present no new questions of law. The trial judge has exhausted the law and properly applied it in this situation. The Court is satisfied that the trial judge's opinion is not without support on the record and the trial judge has, additionally, acted fairly in making factual findings. The Court is satisfied that an Appellate Court could not upset these findings or grant any relief."

Furthermore, a petition for writ of *certiorari* was denied in the United States Supreme Court.[14] At present, there can be no doubt of the conclusive effect of the judgments in Civil Actions Nos. 1490 and 1492.

In this action, petitioner has attempted to mount collateral attacks on the judgments entered in Civil Actions Nos. 1490 and 1492. He contends that the dismissal with prejudice entered on April 8, 1971, did not reflect "petitioner's desire" in the matter and that a transcript of the proceedings on April 8, 1971, would so reflect that it did not. He further contends that, for manifold reasons,[15] the trial conducted by Judge Hunter was ". . . not a full and fair hearing." But, ". . . a former judgment will be binding even though it may have been erroneous. A litigant who has not fully exhausted his rights in a former action or who having exhausted them, seeks to bring that action anew and be heard again from the beginning has already once 'had his day in court and he is not entitled to another

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14. 407 U.S. 922, 92 S.Ct. 2467, 32 L.Ed.2d 807 (1972).

15. Petitioner relies on his suggested findings of fact and conclusions of law and his requests for amended findings of fact and conclusions of law ". . . at Pages 130 and 245 of Civil Action Number 1492 wherein are fully illustrated petitioner's contentions regarding the inadequacy and errors he claims concerning Judge Hunter's findings." But it is well settled that a judgment on the merits is entitled to *res judicata* effect even if erroneous. Restatement of Judgments §§ 1, 48 (1942).

opportunity to present his claim or defense.'" *Thomas* v. *Consolidation Coal Company, supra* at 77.[16] There is, or can be, no contention that there was not subject matter jurisdiction or jurisdiction of the parties in the former action or that the court proceeded ". . . in such an arbitrary or improper manner that its actions may be said to constitute a denial of due process." 1B *Moore's Federal Practice* ¶ 0.405, 652 (2nd ed. 1965).[17] Petitioner's claims in this respect are not cognizable in this action.[18]

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16. In Restatement of Judgments § 48 (1942) comment a, it is noted:

> "The fact that the judgment was erroneous does not preclude the defendant from relying upon it as a bar in a subsequent action brought by the plaintiff on the original cause of action. If it was erroneous, the plaintiff might have taken steps to have it set aside or reversed in the original proceeding. If he has not done so, or if his attempt to do so was unsuccessful, he cannot thereafter collaterally attack it."

17. Counsel for petitioner complains that:

> "the financial limitations of plaintiffs in those cases [Civil Actions Nos. 1490 and 1492] limited the evidence adduced on their behalf. 18 U.S.C. § 3006A(e) provides funding for expert testimony necessary to presentation of a cause wherein counsel is appointed pursuant to 18 U.S.C. § 3006A(g) and (a)(3) or (4). Counsel for plaintiffs in the Civil Rights cases were not appointed under the Criminal Justice Act, were uncompensated and had no source of funding for expenses incurred pursuant to their appointment other than the funding of their employer. R. 184-185. The Court found no source of funding whereby to reimburse their expenses. R. 264. Due to lack of adequate funding whereby to pay expert witnesses, counsel has been advised that the ability to present proof of medical effects of Mace; psychological effects of prolonged incarceration and professional standards of prison administration were greatly hampered and reduced."

It is true that Section 3006A(g), Title 18, United States Code, would permit the appointment of counsel and possible expert witness expenses in habeas actions but not Civil Rights actions. But the conditions on which this testimony might now be offered are not presently continuing conditions which the petitioner is presently suffering, so they are not now cognizable in habeas corpus. *In re Baptista*, 206 F.Supp. 288 (W.D.Mo. 1962). Further, the judgment in Civil Actions Nos. 1490 and 1492 shows ample expert testimony on the subject of mace. Petitioner is no longer in close, segregated confinement.

18. See Footnote 16, *supra*.

There is no issue of absence of identity of parties in this action and Civil Actions Nos. 1490 and 1492. Petitioner, however, insists that, in certain respects, there is no identity of the causes of action. Thus, he contends, if the doctrine of *res judicata* is applicable,

> "There are presented additional issues of (1) denial of equal protection of law in violation of the Fourteenth Amendment by denying Petitioner an equal opportunity to defend before the 'Adjustment Board' as was accorded Wayne Thompson, and (2) denial of 'administrative due process' in violation of the Fifth, Sixth and Fourteenth Amendments by denial of an opportunity to defend against the charges of April 22, 1969, resulting in heightened conditions of confinement; loss of privileges; and l[o]ss of merit time. If the charges resulting in his being confined are untrue and have affected his institutional record and parole opportunities, this would also be a denial of due process of law in violation of the Fifth and Fourteenth Amendments. Judge Hunter did not address those issues."

But, as noted above, the facts respecting the alleged unlawful commitment to maximum security and the alleged lack of procedural due process attending that commitment were fully pleaded in paragraph 24 of Count I(d) of the second amended complaint in Civil Action Nos. 1490 and 1492. If petitioner could have shown that, as he alleged, he was denied procedural due process, he would have been entitled to relief regardless of whether such due process had been accorded to Thompson. There is little doubt that, under these pleaded facts, petitioner might also have shown that

Thompson was accorded due process while he was not.[19] A final judgment on the merits between parties who in law are the same operates as a bar to a subsequent action upon the same cause of action, settling not only every issue that was raised, but also every issue that might have been raised in the first action. *Partmar Corp.* v. *Paramount Picture Theaters Corp., supra*; *Flynn* v. *State Board of Chiropractic Examiners*, 418 F.2d 668 (9th Cir. 1969); *Texas International Airlines, Inc.* v. *C.A.B.*, 473 F.2d 1150, 1155 (D.C.Cir. 1972); *Rankin* v. *State of Florida*, 418 F.2d 482, 486 (5th Cir. 1969); 1B *Moore's Federal Practice* ¶0.405, 632 (2nd ed. 1965); 46 *American Jurisprudence* §417, 585-586 (2nd ed. 1969). Dismissal with prejudice ". . . normally amounts to a final judgment on the merits and bars a later suit on the same cause of action." 1B *Moore's Federal Practice* ¶0.409, 1008 (2nd ed. 1965). If the issue of denial of equal protection was not raised in Civil Actions Nos. 1490 and 1492, then it has not been raised by the petition herein where the issues are substantially identical, as found above.[20]

Petitioner contends that no finding of identity of the issues can be made without a transcript of the proceedings of April 8, 1971, upon which the judgment of dismissal with prejudice of Counts I(d), III(f), VI(i) and IV (except for paragraph 66) was based, and the trial in Civil Actions Nos. 1490 and 1492 being offered in evidence in this case. But the pleadings, judgments and orders

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19. Motive, as it bears upon the possibility of a "good faith" defense, is a relevant issue in civil rights actions. *See, e.g., Notaras* v. *Ramon*, 383 F.2d 403 (9th Cir. 1967). Any evidence of invidious discrimination would be admissible on that issue, and might, at the same time, show denial of equal protection.

20. In this case, the issue is not raised in the petition, the pretrial brief, or any formal amendment thereof. It is not stated as a factual allegation anywhere, although it is stated as a contention in petitioner's response of June 23, 1972, to the show cause order and his pretrial reply brief.

make the identity of issues clear. *Thomas* v. *Consolidation Coal Co., supra*; *Commonwealth of Pennsylvania* v. *Brown, supra.* "[E]xtrinsic evidence may be introduced *if the pleadings do not make clear the precise issues determined by the former judgment.*" 1B *Moore's Federal Practice* ¶0.408, 954-955 (2nd ed. 1965). (Emphasis added.) Further, even if such evidence were permissible in this case, the purpose for which it would be offered by petitioner would not destroy the *res judicata* effect of the prior judgments. Petitioner desires to offer the transcripts to prove mistake in the entry of the judgment of April 8, 1971, and for the purpose of determining the fairness of the hearing held by Judge Hunter in Civil Actions Nos. 1490 and 1492, ". . . the adequacy of the record in said hearing, the evidence adduced at said hearing or the propriety of the result found by Judge Hunter on the various issues." Petitioner's reply pretrial brief, p. 4. But, as noted above, the prior judgments cannot be collaterally attacked in this case. Thus, as was held in *American National Bank & Trust Co.* v. *United States,* 142 F.2d 571 (D.C.Cir. 1944), petitioner may not adduce extrinsic evidence, but, even if he might, it would fail to show that the prior judgment was not on the merits of the issues raised in this action.[21]

Petitioner, however, insists that the doctrine of *res judicata* does not apply in this case because it is to be treated as a petition for writ of habeas corpus. The Supreme Court of the United States, however, held that it could be treated as a petition for relief under Section 1983, Title 42, United States Code, and thus ". . . not subject . . . to exhaustion requirements." *Wilwording* v. *Swenson,* 404 U.S. 249, 251, 92 S.Ct. 407, 30 L.Ed.2d 418, 421 (1971). In dissent, Chief Justice Burger confirmed

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21. See Footnote 15, *supra.*

that the Supreme Court ". . . blandly treats petitioners' habeas corpus petitions as complaints under 42 U.S.C. §1983. . . ." *Wilwording* v. *Swenson*, 404 U.S. 249, 253, 92 S.Ct. 407, 30 L.Ed.2d 418, 422 (1971). Because the majority of the Supreme Court held that petitioner was "entitled" to have this action so treated and remanded it for further proceedings consistent with this opinion, including a determination of whether the doctrine of *res judicata* applied because the same claims had been previously denied in a prior action, this Court would be warranted in treating this action solely as a civil rights claim. Further, Chief Justice Burger noted in his dissent that, up to that time, counsel for the petitioner had "studiously and appropriately avoided" treating these actions as a civil rights claim. But counsel for petitioner did not persist in this "appropriate" course of action. In his pretrial brief in this case, counsel requests "punitive damages" for the hosing and macing of petitioner in June 1969. Recently, in *Preiser* v. *Rodriguez*, 411 U.S. 475, 93 S.Ct. 1827, 36 L.Ed.2d 439 (1973), it was held that "[i]n the case of a damage claim, habeas corpus is *not* an appropriate or available federal remedy." (Emphasis in original.) And it was further held in that case that *res judicata* is ". . . fully applicable to a civil rights action brought under § 1983." *See also, Rhodes* v. *Meyers*, 334 F.2d 709, 716 (8th Cir. 1964). This case is therefore appropriate for a summary judgment of dismissal on the ground of *res judicata*. Respondent so moved in his pleading of July 14, 1972,[22] and the pleadings, as noted above, leave no question of fact to be resolved in this regard.

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22. That motion to dismiss may be treated as a motion for summary judgment under the provisions of Rule 12(b)(6) or Rule 56(c), of the Federal Rules of Civil Procedure. The basic facts necessary to the issue of *res judicata* are shown by the pretrial briefs to be uncontroverted. "With respect to a specific af-

(Continued on following page)

The devious and specious contentions of petitioner's counsel, that principles of *res judicata* are not applicable, are based on obviously erroneous attempts to misuse the rulings in *Sanders* v. *United States*, 373 U.S. 1, 83 S.Ct. 1068, 10 L.Ed.2d 148 (1963) and *Townsend* v. *Sain*, 372 U.S. 293, 83 S.Ct. 745, 9 L.Ed.2d 770 (1963). In these cases it was held that the judgment of denial of habeas corpus relief (or order denying the parallel Section 2255 postconviction motion) is not attended by "conventional notions of finality," or the usual effect of *res judicata*, *Sanders* v. *United States*, 373 U.S. 1, 8, 83 S.Ct. 1068, 10 L.Ed.2d 148, 157 (1963), and that in federal petitions for habeas corpus (and impliedly in parallel postconviction motion under Section 2255) a prior denial of relief will not prevent a new evidentiary hearing if "the trier of fact did not afford the habeas applicant a full and fair hearing" in the prior criminal case resulting in the conviction under attack. *Townsend* v. *Sain*, 372 U.S. 293, 83 S.Ct. 745, 9 L.Ed.2d 770, 786 (1963). The question presented in these cases concerned the finality of collaterally attacked criminal convictions, not the question of finality

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Footnote Continued—

firmative defense such as *res judicata*, the rule seems to be that if the facts are admitted or are not controverted or are conclusively established so that nothing further can be developed by trial of the issue, the matter may be disposed of upon a motion to dismiss whether the decision of the District Court be considered as having been arrived at under the provisions of Rule 12(b)(6) or Rule 55(c)." *Larter & Sons, Inc.* v. *Dinkler*, 199 F.2d 854, 855 (5th Cir. 1952). Further, the defense was initially raised in the brief opposing the grant of *certiorari* in the Supreme Court. It is only if the first judgment is final at the time of the bringing of the second action that the raising of the defense for the first time on appeal is prohibited. *West Virginia N.R.R.* v. *United States*, 391 F.2d 627 (Ct. Cl. 1968). Even if initially raised on appeal, remand is permitted for the purpose of amending the pleadings. *Hayles* v. *Randall Motor Company*, 455 F.2d 169, 173 (10th Cir. 1972). Further, the latter case holds that the defense need not be pleaded if "it appears affirmatively from the pleadings of the party against whom it is asserted."

of judgments in civil cases as is presented in the case at bar. Here the question is the finality of a judgment in a Section 1983 civil case rendered after an opportunity for and the holding of a plenary hearing with full representation of the prisoner by able counsel. By ignoring the obvious distinctions, counsel for petitioner is undertaking to launch a collateral attack on a final judgment on the merits in respect to a litigated Section 1983 civil rights action, in reliance on a special exception permitting successive collateral attacks on criminal convictions wherein ". . . life or liberty is at stake." *Sanders* v. *United States*, 373 U.S. 1, 8, 83 S.Ct. 1068, 10 L.Ed.2d 148, 157 (1963).

The petitioner in this case filed and fully litigated two Section 1983 civil rights actions. *Wilwording* v. *Swenson*, Civil Actions Nos. 1490 and 1492 (W.D.Mo. 1971). Despite the judgments against him on the merits of those actions, he now seeks, by federal habeas corpus asserting the same alleged wrongs and claims for relief, to relitigate the same claims for relief and collaterally attack the final civil judgments. What is even more astonishing, is that he seeks to recover punitive damages in a habeas corpus action. To permit this evasion of applicable principles of *res judicata* would make prisoner civil litigation under Section 1983 endless.

Assuming, while holding to the contrary, that relitigation of the civil claims for relief under Section 1983 is permissible as in habeas corpus if a full and fair evidentiary hearing is not accorded, the records and files of this Court and the Court of Appeals for the Eighth Circuit show conclusively that there is no factual basis for the claim that petitioner failed to receive a full and fair hearing in Civil Actions Nos. 1490 and 1492. Petitioner's direct attempts to appeal in *forma pauperis* from the judgments in those actions were denied by both the District Court

and the Court of Appeals. The District Judge, the Honorable Elmo B. Hunter, found the appeal without merit and frivolous in his order of November 12, 1971, quoted hereinabove. The Court of Appeals on December 6, 1971, in denying leave to appeal in *forma pauperis*, found, in part, that Judge Hunter had "exhausted the law and properly applied it. . ."; that ". . . the trial judge's opinion is not without support on the record and the trial judge has, additionally acted fairly in making factual findings." From a review of the files and records in Civil Actions Nos. 1490 and 1492, it is again found that they conclusively warrant the finding that petitioner had a full and fair evidentiary hearing on the claims he is attempting to reassert in the present action. It is concluded that no new evidentiary hearing in this action is warranted or permissible.

Further, even if this action is to be treated as one for a writ of habeas corpus wherein "[p]rinciples of res judicata are . . . not wholly applicable," *Preiser* v. *Rodriguez, supra,* dismissal is still appropriate because the claims of petitioner which would presently be cognizable in this Court are shown by petitioner's admissions in the pleadings herein not to be continuing conditions of his otherwise lawful confinement. It is established that, in order to be the subject of the immediate, extraordinary relief in habeas corpus, conditions of otherwise lawful confinement must be continuing at the time relief is granted. *Ramsey* v. *Ciccone,* 310 F.Supp. 600 (W.D.Mo. 1970); *In re Baptista,* 206 F.Supp. 288 (W.D.Mo. 1962). In his "legal contentions in response to order to show cause," filed herein on June 23, 1972, petitioner's counsel states that the ". . . 'jailhouse lawyer' issue . . . is no longer being pursued." Further, the hosing and macing, as alleged in his case, is restricted to the time frame

immediately surrounding the date of June 29, 1969. The contention of denial of equal protection is limited to ". . . his commitment to maximum security April 18—September 22, 1969." Petitioner's trial brief, p. 7. The allegation of "denial of access to the courts" is related to petitioner's ". . . commitment to maximum security June 27—July 3, 1969." And it is admitted that all maximum security commitments of petitioner and the living conditions therein ended in February 1971. All of these claims, because they are not continuing, merit dismissal for mootness. *Cf., Ayers* v. *Ciccone,* 431 F.2d 724 (8th Cir. 1970).

Admittedly, the only surviving claims, if the doctrine of *res judicata* is not applicable, are those for restoration of good time, "blood time," and "flood time," and for possible expungement of disciplinary actions unlawfully, or without procedural due process, entered. *Black* v. *Warden, United States Penitentiary,* 467 F.2d 202 (10th Cir. 1972); *Hudson* v. *Hardy,* 137 U.S. App. D.C. 366, 424 F.2d 854, 856 (1970); *McDonnell* v. *Wolff,* 483 F.2d 1059 (8th Cir. 1973). On the issue of possible restoration of good time, however, the rule of *Preiser* v. *Rodriguez, supra,* which was decided after the Supreme Court decision in this case, is that any available and adequate state remedies must be exhausted on this issue before it is cognizable in federal habeas corpus. *See also, McDonnell* v. *Wolff, supra.* There are adequate remedies for the presentation of this issue to the Missouri courts. *Manning* v. *Swenson,* 360 F.Supp. 362 (W.D.Mo. 1973), and cases therein cited. Thus, even if not barred by the doctrine of *res judicata,* this contention would have to be dismissed in favor of petitioner's available state remedies.

The same is true of petitioner's claims for expungement of the disciplinary actions of May and October 1969.

As made clear by the second amended complaint in Civil Actions 1490 and 1492, petitioner claimed loss of good time, merit time, blood time and flood time in connection with both commitments. As stated above these claims for relief were denied by the District Court in the final judgments in Civil Actions Nos. 1490 and 1492. If these claims can be relitigated despite the holding in this case for this Court, prior to the exhaustion of state remedies, to rule that the commitments should be expunged from the records because they "did not meet the requirements of procedural or substantive due process," *McDonnnell v. Wolff, supra*, would be to issue a judgment having, in practicality, controlling effect on any later state decision respecting the restoration of good time. Such a course would defeat the policy underlying the decision in *Preiser v. Rodriguez, supra*, which is that of "allowing the State to deal with these peculiarly local problems on its own" in respect to challenges made to the "fact or duration of . . . physical confinement itself" in state penal institutions. For that reason, in order to make certain that petitioner's state remedies are effectual, the question of whether expungement is proper would also have to be dismissed in favor of petitioner exhausting his state remedies on that issue.

Further, even if the issues were neither moot nor dismissable in favor of state remedies nor *res judicata* because this action must be characterized as one in habeas corpus, they still should be determined adversely to petitioner because of the rule that prior determinations of the same factual issues are entitled to weight in habeas corpus actions. Under the facts and circumstances of this case, they should be accorded controlling weight. *See, Wilwording v. Swenson*, 326 F.Supp. 1145, 1148 (W.D.Mo. 1970), affirmed, 446 F.2d 553 (8th Cir. 1971), where it was said:

> "In Sanders v. United States, 373 U.S. 1, 83 S.Ct. 1068, 10 L.Ed.2d 148, it was held that a determination in habeas corpus might be of controlling weight on a subsequent application for habeas corpus if (1) the same ground presented in the subsequent application was determined adversely to the applicant on the prior application, (2) the prior determination was on the merits, and (3) the ends of justice would not be served by reaching the merits of the subsequent application."

This principle has been held applicable when one determination has been made in a Section 1983 action and another in habeas corpus. *Edwards* v. *Vasel,* 469 F.2d 338 (8th Cir. 1972). Here, there can be no doubt that the prior determinations in Civil Actions Nos. 1490 and 1492 were adverse to petitioner and on the merits. Two of the issues were determined after a full trial and the others by a dismissal with prejudice, which, under the authorities cited above, constitutes a determination on the merits.

Nor would it be in the interests of justice to again reach the merits of these allegations and determine them anew. On the issues which were decided by Judge Hunter after a full and fair trial, Judge Hunter found, in denying leave to appeal in *forma pauperis,* that they were without substance in fact or law. The Court of Appeals has agreed. With respect to the issues which have been determined on their merits by the dismissal with prejudice on April 8, 1971, petitioner had an adequate remedy by means of a motion for relief from the judgment under Rule 60(b)(1) of the Federal Rules of Civil Procedure, filed within a year of the entry of the judgment entered on April 8, 1971. But, although the fact of the finality of this judgment was repeatedly called to the attention

of petitioner and his counsel well within the time for filing such a motion, they declined to file such a motion and insisted instead on consuming additional judicial time and effort by reasserting the issues in this case, wherein they can only be considered frivolous and approaching an abuse of judicial process. In habeas corpus, as in other civil actions, the time must come when the issues must be considered as having been finally adjudicated. In *Wilwording* v. *Swenson*, 446 F.2d 553, 554 (8th Cir. 1971), the Court of Appeals noted that:

> "The ability to focus judicial attention upon the pressing and legitimate claims of *all* litigants requires that, at some point, there be an end to the litigation of *each* claim or ground for relief." (Emphasis in original.)

The above point has long since been reached in this case. Petitioner and his counsel have apparently been fully willing to sacrifice the immediate claims of petitioner for relief, particularly in respect to his possible claims for expungement of disciplinary actions and restoration of allegedly lost good time, in order to attempt to establish a doctrine without merit—that the processes of the Court must always be open to be used and abused at the will of any habeas petitioner or cunning counsel. To this end, counsel for petitioner, an astute practitioner, disclaimed knowledge of the fact, force and effect of the judgments in Civil Actions Nos. 1490 and 1492 in the Supreme Court of the United States when, in the proper exercise of his duties as counsel, he must have known the facts, and had at least constructive notice of the finality of that judgment and its scope and effect. As pointed out extensively in this memorandum, the fact that the merits of all claims raised in the petition at bar had been adjudicated adversely to petitioner in the prior actions was clear

from the pleadings and judgment in Civil Actions Nos. 1490 and 1492 as early as June 28, 1971. Yet, counsel deliberately concealed this from the Supreme Court of the United States at the time.[23]

To excuse this dereliction in his duty to be truthful with the Supreme Court, counsel filed an affidavit in this Court denying that ". . . he has failed to inform himself of the proceedings in the Civil Rights cases by all means known to him." He states that he had only cursory acacquaintance with the pretrial processing of Civil Actions Nos. 1490 and 1492 and that:

> "After receipt of the Respondents' brief in opposition to a writ of certiorari in October, 1971, raising a claim of mootness based on the Civil Rights cases, Affiant inquired of Mr. Willard B. Bunch concerning the details of those cases and obtained his files for review. He advised that due to the number of parties; the number of witnesses; the number of issues and the amount of oral modifications of the pleadings, parties and issues during trial which he could not specify without a transcript, that the Proposed Findings of Fact were the best source of information he could give me. The matter was further complicated by the fact Kenneth Mills was not a party to the Civil Rights action and that Alan Daniel Wilwording had withdrawn from the class action and proceeded separately. Due to the limited time available within which to file a responsive pleading, it was impossible to confer with the Petitioners personally."

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23. This is not the first time that a breach of ethical obligations on the part of petitioner's counsel has been recorded. *See, United States* v. *Hamilton*, 452 F.2d 472, 476-477 (8th Cir. 1971).

It is difficult to believe that counsel could not have inspected the Court files including a copy of Judge Hunter's final judgment, which had been entered on June 28, 1971, or the order of April 8, 1971, and the second amended complaint filed March 3, 1971. As noted above, if these pleadings and judgment are clear—which they are in this case—that controls the issue of *res judicata*. It is incredible that these pleadings were not available to petitioner's counsel, either in the file of the Legal Aid and Public Defender's office or in the court files in Civil Actions Nos. 1490 and 1492, which were open to inspection by counsel at will. It has been noted that one of the reasons for requiring the trial court to make findings of fact and conclusions of law under Rule 52 of the Federal Rules of Civil Procedure, is ". . . to make definite just what is decided by the case in order to apply the doctrines of estoppel and *res judicata* in future cases." 9 Wright and Miller, *Federal Practice and Procedure* § 2571, 679, fn. 7 (1971) and authorities cited therein. Both judgments in Civil Actions Nos. 1490 and 1492 were clear in their provisions and on the issues which they purported to cover. The dismissal with prejudice of April 8, 1971, refers directly and unequivocally to the specific counts and paragraphs of the second amended complaint of March 3, 1971, with no notation that the complaint had been amended further, orally or otherwise. If it was erroneous in that respect, then, as pointed out above, counsel should have filed a post-trial motion to correct or vacate, for even an erroneous judgment is binding under the doctrine of *res judicata*. But counsel was not willing to follow this course of action because of the obvious lack of merit previously adjudicated by the Court of Appeals and the District Court in denying leave to appeal in *forma pauperis*.

This refusal to take any note of the force of the pleadings and judgments in Civil Actions Nos. 1490 and 1492 on the part of counsel for petitioner persisted without abatement and throughout the long course of processing this case which was then necessarily undertaken because of the initial refusal. Even when, on May 11, 1972, this Court issued its order to show cause why this action should not be dismissed under the doctrine of *res judicata*, counsel refused to take note of the pleadings and judgments in Civil Actions Nos. 1490 and 1492. Initially, he filed a "motion to reconsider" the show cause order, contending that it was error to place ". . . the burden of disproof of *res judicata* or collateral estoppel upon Petitioner." But when the prior judgment clearly states what issues it purports to cover, as in this case, the burden shifts to the petitioner or plaintiff ". . . to prove . . . that the [issues in suit] [were] not determined in the [prior] suit." *Covey* v. *American Distilling Co.*, 132 F.2d 453, 456 (7th Cir. 1943).[24]

Further, even after that motion was denied, counsel for petitioner, in setting forth those allegations which he contended were not included in the prior judgments, as noted above, could only come up with contentions which were squarely raised and adjudicated in the prior cases. When this was made clear by the respondent's reply pretrial brief, petitioner and his counsel shifted their contentions to focus then upon the alleged denial of equal protection with respect to the maximum security commitment in April 1969 and alleged lack of "administrative due process," issues which had not theretofore been raised in

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24. See Footnote 9, *supra*.

this proceeding.[25] Finally, when it was made clear that all of the issues herein were not presently litigable, counsel for petitioner mounted a general collateral attack on the trial conducted by Judge Hunter—an attack which clearly cannot be maintained in this action—and finally sought to shift the blame for petitioner's inability to discover any issues which could properly be raised in this action upon this Court and the United States Court of Appeals for the Eighth Circuit, stating that:

> "It is further suggested by Petitioner that res judicata and collateral estoppel do not and should not apply in this particular cause for the reason that petitioner was required to proceed in the Civil Actions 1490 and 1492 only because of the erroneous denial of his original petition in habeas corpus by this Court and by the erroneous denial of his appeal therefrom by the United States Court of Appeals for the Eighth Circuit. It is suggested that Respondent should not be allowed to profit from error to Petitioner which he solicited from this Court and from the Court of Appeals for the Eighth Circuit."

Little sympathy can be rightly accorded to petitioner and his counsel when time and again they were given clear and unmistakable notice that the claims herein had already been adjudicated and that if the prior adjudication was erroneous, appropriate motions for relief from the prior judgments should be filed. But, apparently the motive of establishing an abstract point ranked higher with petitioner and his counsel than any actual solicitude for

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25. If this is to be considered a habeas corpus action, as petitioner insists, then such belated raising of the factual issues is improper. *Strauser* v. *Ciccone*, 310 F.Supp. 1011, 1014 (W.D.Mo. 1970), affirmed 432 F.2d 1359 (8th Cir. 1970).

the restoration of good time or expungement of records of disciplinary actions. This attitude is especially lamentable for it was the duty of counsel for petitioner to see that the rights of petitioner were asserted by the proper methods. His performance in this case has not been keeping with his professional obligations.[26]

For the foregoing reasons, it is therefore

ORDERED and ADJUDGED that all relief sought herein by petitioner-plaintiff be, and it is hereby, denied with prejudice. It is further

ORDERED and ADJUDGED that judgment be, and it is hereby, entered for respondent.

/s/ William H. Becker
William H. Becker
Chief Judge

Kansas City, Missouri
Date: 12-4-73

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26. See Footnote 23, *supra*.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 74-1071

ALAN DANIEL WILWORDING,
Appellant,

v.

HAROLD R. SWENSON, Warden, Missouri Penitentiary,
Appellee.

Appeal from the United States District Court for the
Western District of Missouri.

Submitted: June 14, 1974.
Filed: September 10, 1974.

Before LAY, ROSS and STEPHENSON, Circuit Judges.

LAY, Circuit Judge.

Petitioner Wilwording has spent five unsuccessful years seeking an evidentiary hearing on his claim of unconstitutional disciplinary measures in the Missouri State Penitentiary. In 1969, he filed a § 1983 civil rights action in the United States District Court for the Western District of Missouri and a petition for a writ of habeas corpus in the Circuit Court of Cole County, Missouri. The habeas petition was denied. The Supreme Court of Missouri affirmed the denial of the writ in December, 1969. Petitioner then filed the federal habeas petition involved in this appeal. The

United States District Court dismissed the habeas petition on the ground that Wilwording had failed to exhaust a number of extraordinary writs theoretically available in Missouri in addition to the state habeas claim. This court affirmed on that ground, *Wilwording* v. *Swenson*, 439 F.2d 1331 (8th Cir. 1971). The Supreme Court of the United States summarily reversed, holding that Wilwording had adequately fulfilled the exhaustion requirement.

> The exhaustion-of-state-remedies rule should not be stretched to the absurdity of requiring the exhaustion of . . . separate remedies when at the outset a petitioner cannot intelligently select the proper way, and in conclusion he may find only that none of the [alternatives] is appropriate or effective.

Wilwording v. *Swenson*, 404 U.S. 249, 250 (1971).

The Court alternatively held that the petition might be viewed as arising under § 1983, in which event there was no exhaustion requirement. *Id.* at 251.[1] The Court remanded with directions, *inter alia*, to determine the effect on the habeas claim of Wilwording's separate civil rights suit, which had meanwhile been consolidated with those of several other Missouri prisoners. In those consolidated cases, at a pretrial conference of which no transcript has been prepared,[2] the decision was made to drop most claims other than the Eighth Amendment claims which were the common question. Judge Elmo Hunter of the Western District of Missouri dismissed with prejudice the non-Eighth Amendment questions and tried the remaining

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1. The Supreme Court later characterized Wilwording's petition as generally attacking "conditions of confinement." *See Prieser* v. *Rodriguez*, 411 U.S. 475 (1973).

2. Present counsel did not represent petitioner for purposes of the civil rights suit. Counsel's motion for a transcript of the original trials was denied. Record at 36, 43; Slip Opinion at 19.

claims on the merits.[3] On June 28, 1971, Judge Hunter, in an exhaustive opinion, denied relief to Wilwording and all other petitioners. The prisoners were denied a certificate of good faith to appeal by both the district court and this court. The Supreme Court denied certiorari, *Beishir* v. *Swenson*, 407 U.S. 922 (1972).

Thereafter, Wilwording continued to prosecute his habeas claim. On January 18, 1972, after remand from the Supreme Court, this court sent the habeas case back to the district court. Counsel was appointed on May 11, 1972, and all pleadings were completed shortly thereafter. Pretrial briefs were ordered in January, 1973, and were filed by June of that year. On December 3, 1973, the district court, without evidentiary hearing, filed a detailed 52-page opinion denying petitioner relief on three alternative grounds: (1) that Wilwording's habeas petition should be viewed as a § 1983 action, so that *res judicata* would bar relitigation of issues tried in the civil rights suit; (2) that even if the habeas petition was viewed outside of a § 1983 claim, the dismissal in the civil rights suit should be given "controlling weight;" and (3) that any claims not adjudicated in the civil rights suit had not been stated in the original habeas petition and hence could not now be introduced without returning to the state courts to exhaust remedies there.

A. *Nature of the Claim—Habeas or § 1983?*

Although the Supreme Court did state alternatively that Wilwording might be "entitled" to have his claims viewed as § 1983 questions, we find that ruling should not be invoked against him to deny relief here. On this second appeal, Wilwording has abandoned his cruel and un-

3. One non-Eighth Amendment claim of petitioner, that of denial of access to the courts, was apparently tried on the merits in the civil rights action.

usual punishment claims. He urges that his petition must be treated as one seeking only habeas corpus relief (the petition has at all times been so entitled) since the surviving claims relate to denial of due process in disciplinary proceedings resulting in a false prison record and loss of good time.[4]

In his *pro se* complaint *Wilwording* generally alleged a denial of substantive and procedural due process in the prison disciplinary action. He alleged:

> [t]hat the petitioner's institutional record has been greatly tainted by the respondents [sic] false and unjust reports with absolutely no valid evidence to support such charges. That the petitioner must be granted proper judicial review by this Honorable Court regarding these false charges, to clear his record of any wrong doing for further parole consideration.

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4. Petitioner on remand attempted to amend the petition so as to clarify the grounds relied upon. The district court refused to allow the amendment, apparently on the ground that the petition should be reviewed in the same form as that presented to the Supreme Court. We disagree. Whenever counsel can assist the court in clarifying a *pro se* petition, the trial court should welcome the assistance. Obviously, if counsel added new factual grounds, requiring exhaustion, these must be rejected. On the other hand, *pro se* petitions should be liberally construed and if the amended grounds factually relate to the original *pro se* complaints, dismissal and a new round of litigation in the state courts should not be required. In the instant case an amended petition could well have obviated the claims now abandoned; additionally it might well have clarified petitioner's right to an evidentiary hearing on the claims still before us.

It has been observed:

> The habeas statute permits amendment of a petition according to the rules applicable in civil actions. The Civil Rules provide for amendment at any time by leave of court, and leave is to be "freely given when justice so requires." Recognizing the efficiency and fairness of resolving all of a petitioner's habeas claims in one hearing, the courts have permitted liberal use of the amendment privilege.

Note, *Developments in the Law—Federal Habeas Corpus*, 83 Harv. L. Rev. 1038, 1178-79 (1970).

Although inarticulately expressed, this sufficiently alleges that petitioner's prison record contains false charges and affects his parole consideration. He claims "illegal detention," in that his imprisonment may be lengthened by arbitrary government action taken without evidence. These allegations also raise the problem of loss of good time. Such issues are clearly cognizable in habeas corpus under *Preiser* v. *Rodriguez*, 411 U.S. 475 (1973).[5]

Treating Wilwording's petition as a petition for a writ of habeas corpus subjects it to the requirement in 28 U.S.C. § 2254 of exhaustion of state remedies. However, the claims surviving were, as discussed above, adequately raised in the initial petition considered by the Supreme Court. The Supreme Court determined that Wilwording's state habeas claim had fulfilled the exhaustion requirement by giving the state "an initial 'opportunity to pass upon and correct' alleged violations of its prisoners' federal rights." *Wilwording* v. *Swenson*, *supra* at 250. Thus the law of this case is that the exhaustion requirement is satisfied.

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5. The Supreme Court noted in *Preiser* that

> [T]he respondents' suits in the District Court fell squarely within this traditional scope of habeas corpus. They alleged that the deprivation of their good-conduct-time credits was causing or would cause them to be in illegal physical confinement, i.e., that once their conditional-release date had passed, any further detention of them in prison was unlawful; and they sought restoration of those good-time credits, which, by the time the District Court ruled on their petitions, meant their immediate release from physical custody.
>
> Even if the restoration of the respondents' credits would not have resulted in their immediate release, but only in shortening the length of their actual confinement in prison, habeas corpus would have been their appropriate remedy. For recent cases have established that habeas corpus relief is not limited to immediate release from illegal custody, but that the writ is available as well to attack future confinement and obtain future releases.

411 U.S. at 487.

B. *Finality in Criminal Proceedings: Res Judicata, Collateral Estoppel, and Controlling Weight*

Viewing the petition as seeking a writ of habeas corpus, traditional notions of *res judicata* become inapplicable. As the Supreme Court recognized in *Sanders* v. *United States*, 373 U.S. 1 (1963):

> Conventional notions of finality of litigation have no place where life or liberty is at stake and infringement of constitutional rights is alleged. . . . The inapplicability of *res judicata* to habeas, then, is inherent in the very role and function of the writ.

Id. at 8.

Accord, Preiser v. *Rodriguez, supra* at 497; *Fay* v. *Noia*, 372 U.S. 391, 423 (1963); *Townsend* v. *Sain*, 372 U.S. 293, 312-13 (1963); Vestal, Res Judicata/Preclusion 270 (1969).

Nor does it appear that the petitioner's voluntary dismissal of these claims from the civil rights suit would bar a hearing on them now under the usual principles of collateral estoppel. It has long been recognized that dismissal at plaintiff's request, even if it is with prejudice, is insufficient to invoke the bar of collateral estoppel. That doctrine precludes a new hearing only on "issues actually litigated and determined in the prior suit." *Lawlor* v. *National Screen Service Corp.*, 349 U.S. 322, 326 (1955).

As the district court recognized, however, the principle that the judicial interest in finality is greatly attenuated in challenges to custody of the person does not mean it is absent altogether. The district court thus held that if neither *res judicata* nor collateral estoppel barred Wilwording's claim, nevertheless the prior dismissal with prejudice should be accorded "controlling weight." In

Sanders v. *United States*, *supra*, the Supreme Court set out criteria for determining when controlling weight may be given to denial of a prior application for federal collateral relief. The Court held that prior determination would bar a rehearing only if all three of the following conditions were met:

> (1) the same ground presented in the subsequent application was determined adversely to the applicant on the prior application, (2) the prior determination was on the merits, and (3) the ends of justice would not be served by reaching the merits of the subsequent application.

Id. at 15.

Dismissal with prejudice might be an adverse determination within the meaning of the first *Sanders* criterion, but it will not satisfy the second. The requirement of a decision "on the merits" in this context means that *an evidentiary hearing was held* on the contested issues of fact, unless it could be said that the files and records conclusively resolved the issue. *Id.* at 16; *Raiford* v. *United States*, 483 F.2d 445, 446 (9th Cir. 1973); *Cancino* v. *Craven*, 467 F.2d 1243, 1246 (9th Cir. 1972); *Oliver* v. *United States*, 398 F.2d 353, 355 n.5 (9th Cir. 1968). In the instant case, the surviving claims were dismissed before trial, so there was no evidentiary hearing, and those claims rest on contested issues of fact which were not resolved. Thus, the second *Sanders* criterion is unsatisfied, so it was error to attribute controlling weight to the dismissal in the civil rights suit. We conclude that the *Sanders* criteria have not been satisfied and that the judgment in Wilwording's prior civil rights suit cannot properly be accorded "controlling weight" in the present habeas proceeding.

C. *Voluntary Dismissal as Waiver Barring Subsequent Relief*

Res judicata, collateral estoppel and "controlling weight" do not exhaust the grounds for denial of a second application for federal relief, although those are the only grounds advanced by the respondents and discussed by the court below in this case. The principles of equity have traditionally governed habeas corpus, and among those is the idea that the petitioner's bad faith or otherwise inequitable conduct may merit denial of relief. Where a prisoner deliberately bypasses an adequate state remedy, or purposefully withholds or withdraws a known claim from a prior application for federal relief, that may be deemed a waiver of any right to a subsequent hearing on the claim. *Sanders* v. *United States, supra* at 18; *Fay* v. *Noia, supra* at 433, 438-39; *Townsend* v. *Sain, supra* at 317. *Cf. Price* v. *Johnston*, 334 U.S. 266, 289-92 (1948); *Wong Doo* v. *United States*, 265 U.S. 239, 241 (1924).

Such abuse of the writ, however, is "rare and extraordinary." *Simpson* v. *Wainwright*, 488 F.2d 494, 495 (5th Cir. 1973). The burden of pleading and proving waiver of these constitutional claims falls on the government. *Sanders* v. *United States, supra* at 17; *Price* v. *Johnston, supra* at 291-92; *United States* v. *Lee*, 446 F.2d 350, 352 (9th Cir. 1971). Because a finding of waiver bars even a meritorious claim for habeas corpus relief, the government's burden is a heavy one. The Supreme Court made it clear in *Fay* v. *Noia* that legal fictions were not to be introduced to deny habeas corpus relief, and that waiver in this context means "an intentional relinquishment or abandonment of a known right or privilege." 372 U.S. at 439. While *Fay* dealt with "deliberate bypasses" of state remedies, *Sanders* adopted that definition of waiver for use

where prior opportunities for federal relief have allegedly been sidestepped. 373 U.S. at 18-19.

It might be argued (although it has not been in the briefs on appeal or the opinion below) that Wilwording's dismissal from the civil rights suit of the claims here pursued was such an "intentional abandonment of a known right." Since this claim was not raised below, the facts surrounding those dismissals are not adequately developed. However, a study of the record indicates that Wilwording is not abusing the writ so as to foreclose relief on those claims. First, at the time the dismissals were entered, Wilwording's habeas petition raising the same claims was pending in the same district court against the same respondents. Absent the transcript of the conference at which dismissal was orally agreed upon, it cannot be demonstrated that Wilwording or his attorney actually understood that voluntary dismissal from one suit would bar the claim from the habeas proceeding as well. Nor can it be said that they should have so interpreted the situation, for the principle that *res judicata* does not apply to habeas was already well established. Furthermore, the reason advanced for the dismissals, *i.e.*, simplifying trial of the common questions in a consolidated case by eliminating other issues, lends support to petitioner's claim that he never intended to dismiss "with prejudice."

In sum, the government has not shown and the record does not indicate that Wilwording's conduct has been inequitable or in bad faith so as to justify denial of relief. Dismissal of a claim from one suit when the same claim is still pending in another suit does not lull the state into false security until it is too late to present an adequate defense. To bar relief now merely because Wilwording did not appeal from the dismissal with prejudice nor attempt within one year to set it aside would be the kind of

technical forfeiture of constitutional claims which the Supreme Court rejected in *Fay*.

D. *Availability of the Relief Requested*

There remains one final obstacle to a hearing on the merits of Wilwording's claims. The Supreme Court recently defined the minimum requirements of procedural due process in prison discipline, but it declined to give them retroactive effect. The Court held it too great a burden on the administration of justice to require expungement of prison records and restoration of good time whenever prior disciplinary actions had not met the newly announced procedural standards. Further, the Court noted that prison officials had relied in good faith on *prior law not requiring the full array of new procedures*, and the majority observed that the old procedures were not so unreliable as to warrant full retroactivity. *Wolff* v. *McDonnell*, 94 S.Ct. 2963, 2983 (1974).

If *Wolff* covers Wilwording's case, then his claim, however justified on the merits and however diligently pursued for five years, might be denied without an evidentiary hearing as one in which no relief can be granted.[6]

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6. *Wolff* leaves uncertain the extent of nonretroactivity—that is, whether the doctrine will apply to pending cases or will affect only the litigants in *Wolff* itself. As the *Wolff* opinion notes, many district courts and courts of appeal have in varied forms long recognized that procedural due process applies to prison disciplinary procedures. 94 S. Ct. at 2963 n.20. The Supreme Court has previously given general recognition to the applicability of procedural due process to prison discipline claims. *Cf. Haines* v. *Kerner*, 404 U.S. 249 (1971). Thus, equitable principles would seem to require some form of procedural due process applicable to prisoners' claims which were pending in the courts at the time of the *Wolff* decision. We need not decide this precise issue here since, as we will discuss, petitioner's claim does not rest solely on the denial of procedural due process, but in addition on the allegation of a total absence of evidence linking him to the offense for which he was punished.

We do not believe that that result is required in this case. Wilwording's claims are based not so much on the failure of Missouri's penitentiary to accord him procedural due process, the area defined in *Wolff*, as on a denial of the substance of due process. Wilwording alleges that he was punished for having allegedly helped plot an escape, and that that punishment was imposed without *any* evidence being offered against him. Punishment imposed in the complete absence of evidence against the accused in a criminal case has long been recognized as arbitrary and hence invalid. "Just as 'Conviction upon a charge not made would be sheer denial of due process,' so is it a violation of due process to convict and punish a man without evidence of his guilt." *Thompson* v. *Louisville*, 362 U.S. 199, 206 (1960); *accord, Gregory* v. *Chicago*, 394 U.S. 111, 112 (1969). Protection of individuals against arbitrary government action is the "great purpose" of the due process clause. *Dent* v. *West Virginia*, 129 U.S. 114, 124 (1889). Long before the requirements of *procedural* due process were imposed on prison disciplinary proceedings, this court recognized that those proceedings must at least afford *substantive* due process. We noted the history of this dichotomy in *McDonnell* v. *Wolff*, 483 F.2d 1059 (8th Cir. 1973):

> The trial court properly held that Fourteenth Amendment substantive due process requirements are applicable to disciplinary proceedings. Even in those earlier cases in which we held procedural due process inapplicable in comparable settings, we recognized that administrative determinations must not be arbitrary. See, Morrissey v. Brewer, *supra*, 443 F.2d at 950; Douglas v. Sigler, 386 F.2d 684, 687 (8th Cir. 1967). It would serve little purpose to require fair procedures but to permit arbitrary results. The procedures are not ends in themselves, but a means to

> insure that decisions imposing substantial penalties will be based on the knowledge that grounds for the imposition of the penalties exist. The courts, therefore, have a limited right to review the merits of decisions imposing substantial penalties. In each case, the sole concern of the court must be whether the decision of the prison authorities is arbitrary and capricious. It must not substitute its judgment for that of the prison authorities.

Id. at 1063.

We of course express no opinion on the merits of Wilwording's petition; whether prison officials in fact had evidence to support the deprivation of good time, solitary confinement, and charges in his record for parole is for the trial court to determine. "[W]hether the charges against petitioner were so totally devoid of evidentiary support as to render his [punishment] unconstitutional . . . turns not on the sufficiency of the evidence, but on whether [there was] any evidence at all." *Thompson* v. *Louisville, supra* at 199. We conclude that Wilwording's allegation that he is subjected to continuing punishment without any evidence against him adequately raises a claim for relief which is beyond the scope of and hence not foreclosed by the nonretroactivity holding of *Wolff*.

The case is remanded to the district court with directions that the petitioner be granted an evidentiary hearing as to his claim relating to the loss of good time which allegedly was deprived him by a denial of due process of law.

Judgment reversed and remanded.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

APPENDIX C

PETITION FOR WRIT OF HABEAS CORPUS

(Filed January 28, 1970)

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
PERSONS IN STATE CUSTODY

Civil Action No. 18049-3
(To be supplied by the Clerk
of the District Court)

Daniel Wilwording 08759
Full name and prison number (if any)
of petitioner

v.

Harold R. Swenson, et al.,
Name of respondent

INSTRUCTIONS—READ CAREFULLY

In order for this petition to receive consideration by the District Court, it shall be in writing (legibly handwritten or typewritten), signed by the petitioner and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, petitioner may finish his answer to a particular question on the reverse side of the page or on an additional blank page. Petitioner shall make it clear to which question any such continued answer refers.

Since every petition for *habeas corpus* must be sworn to under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Petitioners should therefore exercise care to assure that all answers are true and correct.

If the petition is taken *in forma pauperis*, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that petitioner will be unable to pay the fees and costs of the *habeas corpus* proceedings. When the petition is completed, *the original and two copies* shall be mailed to the Clerk of the United States District Court for the Western District of Missouri.

1. Place of dentention Missouri State Penitentiary

2. Name and location of court which imposed sentence Circuit Court—Greene County, Mo.

3. The indictment number or numbers (if known) upon which and the offense or offenses for which sentence was imposed:

(a) First Degree Robbery

(b) .....

(c) .....

4. The date upon which sentence was imposed and the terms of the sentence:

(a) June 25, 1964—20 years

(b) .....

(c) .....

5. Check whether a finding of guilty was made

(a) after a plea of guilty .....

(b) after a plea of not guilty √

(c) after a plea of *nolo contendere* .....

6. If you were found guilty after a plea of not guilty, check whether that finding was made by

(a) a jury √

(b) a judge without a jury .....

7. Did you appeal from the judgment of conviction or the imposition of sentence? Yes

8. If you answered "yes" to (7) list

(a) the name of each court to which you appealed:

Missouri Supreme Court

i. .....

ii. .....

iii. .....

(b) the result in each such court to which you appealed:

i. Affirmed

ii. .....

iii. .....

(c) the date of each such result:

i. October 1965

ii. .....

iii. .....

(d) if known, citations of any written opinion or orders entered pursuant to such results:

i. .....

ii. .....

iii. .....

9. If you answered "no" to (7), state your reasons for not so appealing:

(a)

(b)

(c)

10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

(a) See Supplementary Pages

(b) See Supplementary Pages

(c) See Supplementary Pages

11. State concisely and in the same order the facts which support each of the grounds set out in (10):

(a) See Supplementary Pages

PETITION FOR WRIT OF HABEAS CORPUS

Comes now your petitioner, and states and alleges the following particulars to wit:

(1) That the petitioner is presently confined at the Missouri State Penitentiary.

(2) That Harold R. Swenson is the Warden at the Missouri State Penitentiary.

(3) That the respondents have severely violated this petitioners Constitutional and civil rights. That the Respondents under the color of state law violates petitioners right to Due Process of Law as guaranteed him by the 14th Amendment of the United States Constitution; That the respondents have subjected this petitioner to cruel and unusual punishments in violation of the 8th Amendment of the United States Constitution.

(4) That the respondent is punishing petitioner without Due Process of Law for exercising his inherent right to petition the court of law for just redress.

(5) That the respondent is now punishing petitioner for aiding and assisting other prisoners (on their request) relative to the preparation of Civil Complaints regarding

the massive infliction of cruel and unusual punishment by the Missouri State Penitentiary officials. SEE: *Johnson* v. *Avery* U.S. Supreme Court decision providing for prison inmates to advise one another relative to the science and compelities of the law.

(6) That the respondent unjustly and falsely accused this petitioner of plotting to escape, agator of a work strike. That the latter accusation was fabricated in retaliation for this petitioners act of assisting other prisoners to prepare civil complaints against prison policy, to various courts of law.

(7) That the respondents have inflicted cruel and unusual punishment upon the petitioner by means of a high presure fire hose and Chemical-Mace while the petitioner was locked securly in his cell with seven other inmates who were causing no trouble and were utterly helpless.

(8) That the repondent is presently forcing this petitioner to live under conditions that are hardly fit for human habitation and are extra punitive.

(9) That the petitioner's institutional record has been greatly tainted by the respondents false and unjust reports with absolutely no valid evidence to support said charges. That the petitioner must be granted proper judicial review by this Honorable Court regarding these false charges, to clear his record of any wrong doing for further parole consideration.

WHEREFORE petitioner makes claims to this Honorable Court that in light of the foregoing, respondents have breached petitioners commitment by committing acts against the petitioner far in excess of the respondents jurisdiction as a Public-Servant to safely keep this petitioner as prescribed by law. See: *Hancock* v. *Avery* (M.D.Tenn.) 301 F. Supp. 786, holding . . . "Cruel and unusual punish-

ment may be comprised of punishment in excess of that which is necessary to accomplice ligitimate penal aims. . .".

Petitioners prays that this Honorable Court will issue preliminary writ, (ORDERING) respondent to produce the body of the petitioner with the return, requiring the respondent to show legal cause why the petitioner should not be discharged from illegal detention. That the petitioner has fully exhausted his State Court remidies regarding this very claim by submitting a petition for Habeas Corpus relief to the Circuit Court of Cole County, Missouri. No. #24521, writ denied Nov. 21, 1969. Petitioner did submit the very same claim to the Missouri Supreme Court, No. #55221, writ denied Jan. 12, 1970.

PETITIONER will ever pray for the relief herein sought.

Respectfully submitted,

/s/ .....
Daniel Wilwording, Petitioner, pro se

(b)

(c)

12. Prior to this petition have you filed with respect to this conviction

(a) any motion to vacate, set aside or correct sentence under Missouri Supreme Court Rule 27.26? Yes

(b) any petitions in State or Federal courts for *habeas corpus*? Yes

(c) any other petitions, motion or applications in this or any other court? No

(d) any petitions in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? No

(e) any appeal from the refusal to grant, or the denial of, any of the motions, applications or petitions mentioned in paragraphs (a), (b), or (c) above? No

13. If you answered "yes" to any part of (12), list with respect to each petition, motion, application or appeal

(a) the specific nature thereof:

i. Motion under Rule 27.26

ii. .....

iii. .....

iv. .....

(b) the name and location of the court in which each was filed:

i. Greene County Circuit Court — Mo S. Ct.

ii. And U.S. Dist Court, Western Dist

iii. of Missouri

iv. .....

(c) the disposition thereof:

i. Affirmed

ii. Habeas Corpus denied

iii. .....

iv. .....

(d) the date of each such disposition:

i. January 69' 27.26 appeal Mo.S.Ct.

ii. October 69' U.S. Dist Ct. Western Dist.

iii. .....

iv. .....

(e) If known, citations of any written opinions or orders entered pursuant to each such disposition:

i. Conclusions & findings of Fact — Hon James Keet

ii. Green County Circuit Court - - -

iii. Missouri Supreme Ct. Opinion - - -

iv. Habeas Corpus denied by Hon William H. Becker U.S. Dist Ct.

14. Has any ground set forth in (10) been previously presented to this or any other court, state or federal, in any petition, motion or application which you have filed? Yes

15. If you answered "yes" to (14), identify

(a) which grounds have been previously presented:

i. illegal detention — breech of

ii. Comittment — denied without prejudice for

iii. failure to exhaust state remedy

(b) the proceedings in which each ground was raised.

i. Habeas Corpus

ii. .....

iii. .....

16. If any ground set forth in (10) has not previously been presented to any court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:

(a)

(b)

(c)

17. Were you represented by an attorney at any time during the course of

(a) your arraignment and plea? Yes

(b) your trial, if any? Yes

(c) your sentencing? Yes

(d) your appeal, iff any, from the judgment of conviction of the imposition of sentence? Yes

(e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? Yes

18. If you answered "yes" to one or more parts of (17), list

(a) the name and address of each attorney who represented you:

i. William A. Moon — Springfield, Mo.

ii. Jerry L. Redfern — Springfield, Mo.

iii. .....

(b) the proceedings at which each such attorney represented you:

i. Moon — Preliminary Hearing -- trial — Appeal

ii. Redfern — 27.26 proceedings & appeal therefrom

iii. .....

19. If you are seeking leave to proceed *in forma pauperis*, have you completed the sworn affidavit setting forth the required information (see instructions, page 1 of this form)? Yes

//s/ Daniel Wilwording
Signature of Petitioner

STATE OF MISSOURI)
) SS
COUNTY OF POLK)

....., being first sworn under oath, presents that he has subscribed to the foregoing petition and does state that the information therein is true and correct to the best of his knowledge and belief.

/s/ Daniel Wilwording
Signature of Affiant

SUBSCRIBED AND SWORN to before me this ..... day of (month) ....., (year) .....

/s/ Joseph A. Hearne
Notary Public

My commission expires (month, day, year) .....
.....

APPENDIX D

CIRCUIT COURT FOR THE COUNTY OF COLE
STATE OF MISSOURI

(Received March 16, 1973, Warden's Office, Mo. State Penitentiary)

No. 26,342

DANIEL A. WILWERDING,
Plaintiff

vs.

H. R. SWENSON, WARDEN,
Defendant

SUMMONS

The State of Missouri to Defendant, H. R. Swenson

You are hereby summoned to appear before the above-named court and to file your pleading to the petition, copy of which is attached hereto, and to serve a copy of your pleading upon Daniel A. Wilwerding, No. 08759, P.O. Box 900, J.C.Mo. 65101 attorney.... for plaintiff...., whose address is ..... all within 30 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the petition.

Lucille R. Sheley
Circuit Clerk.

By /s/ Elaine S. Healey
Deputy Clerk.

(Seal of Circuit Court)

Dated Mar. 16, 1973.

CC: Atty. Gen.

DIRECTIONS TO CLERK

The clerk should insert in the summons the names of only the defendant or defendants who are to be personally served by the officer to whom the summons is delivered. The summons should be signed by the clerk or deputy clerk under seal of the court and a copy of the summons and a copy of the petition for each of such defendants should be delivered along with the original summons to the officer or other person who is to make service. The copy of the summons may be a carbon or other copy and should be signed and sealed in the same manner as the original but it is unnecessary to certify that the same is a true copy. The copy of the petition may be a carbon or other copy and should be securely attached to the copy of the summons but need not be a true copy. If plaintiff has no attorney, the address of plaintiff should be stated in the summons, and the words "attorney.... for" eliminated. (See Civil Code, Secs. 24 to 27, 68 and Rule 3.09 of the Supreme Court.)

COLE COUNTY CIRCUIT COURT
JEFFERSON CITY, MISSOURI

Cause No.: 26342

DANIEL A. WILWERDING (Prison No. 08759)
Plaintiff

v.

H. R. SWENSON, Warden, et al,
Defendant

PETITION FOR DECLARATORY JUDGMENT

(Filed March 16, 1973)

Comes now Daniel A. Wilwerding, plaintiff pro se, herein, and petitions this court for a Declaratory Judgment under the authority and the provisions of Section 527.010, 527.020 R.S.Mo. 1959 and Missouri Supreme Court Rules 87.01, 87.02, 87.08 so invoked herewith.

That plaintiff states his rights under the fourth (4), fifth (5) and fourteenth (14) Amendments to the Constitution of the United States are being violated by defendant's wilful deprival of plaintiff's personal property; denial of due process of law; and denial of equal protection of the law thereby entitling plaintiff to relief from this court.

See: Wilwording v. Swenson doctrin
decided 12/14/71, U.S.Sp.Ct.

STATEMENT OF FACTS

Upon or about Nov. 15, 1972, at approximately 9:45 P.M., B.J. Poiry, administrative assistant to Warden H.R. Swenson, defendant, did then and there under the guise and color of state law by and through his official position,

seize from plaintiff for defendant Swenson the sum of one hundred and five dollars ($105.00). These same monies were recognized as lawful currency of the United States, and were considered to be contraband by defendant Swenson under color of R.S.Mo. 1969, Section 216.315.

Plaintiff spent the night of Nov. 15, 1972, in the punitive unit subsequent to the seizure of the monies. On Nov. 16, 1972, plaintiff was taken before the Prison Adjustment Board approximately 9:00 A.M. Said Board sentenced plaintiff to five (5) days in the punitive unit for possession of contraband. The Adjustment Board ruled that the $105.00 would not be placed in plaintiff's personal account so that he might claim it upon his discharge as plaintiff requested. The Board ordered the monies placed at the disposal of defendant Swenson, to be used as he saw fit for public use.

Plaintiff alleges that this particular confiscation of lawful currency without reparation is unconstitutional in that it is a direct violation of the Fourth (4), Fifth (5) and Fourteenth (14) Amendments to the United States Constitution and particularly to that part concerning the wilful deprival of personal property:

Article V

". . . nor shall private property be taken for public use without just compensation."

Article XIV

". . . no rshall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the law."

It is further alleged that this deprival is in direct contravention to R.S.Mo. 1969, Sec. 216.310; which pertains to the personal property of a prisoner and the holding of same by the Warden of the facility wherein said prisoner is confined. Plaintiff's complaint of denial of due process is predicated upon the failure of defendant Swenson to adhere to R.S.Mo., 1969, Sec. 216.310, supra.

WHEREFORE PLAINTIFF PRAYS:

(1) That this honorable court enter and adjudicate declaratory relief with respect to the monies ($105.00) in question, in that said property is wrongfully detained by defendant and plaintiff is in danger of the permanent loss of the property unless it be taken out of possession of the defendant and placed in plaintiff's personal property or account for claim when plaintiff is discharged from the penitentiary.

(2) That this honorable court award plaintiff such other and further relief as the court shall deem just and proper.

Plaintiff does not have the funds in which to pay for the cost for the proceedings in this action, however, plaintiff believes that he is entitled to the redress he seeks in this cause, and plaintiff moves this court to allow plaintiff to proceed as a pauper in this cause and moves this court to appoint counsel for plaintiff in this cause, and set a date for hearing of the issues or in the alternative grant petitioner the relief he prays for in this motion.

Respectfully submitted,

/s/ D. A. Wilwerding

D. A. Wilwerding, Plaintiff

IN THE CIRCUIT COURT OF COLE COUNTY, MISSOURI

No. 26,342

DANIEL A. WILWERDING,
Plaintiff

vs.

DONALD WYRICK, Warden, Missouri State Penitentiary
Defendant

This cause was tried to the Court without a Jury.

It is undisputed that the Plaintiff was an inmate of the Missouri State Penitentiary and has been for approximately six years.

On November 15, 1972, the officers of the penitentiary made a search of Plaintiff's cell and found $105.00 in cash behind a mirror in his cell. The Plaintiff testified that he had $350.00 in cash when he entered the penitentiary, and that this was overlooked by the penitentiary authorities when he was searched at that time. The sum has dwindled to the $105.00 in question.

The penitentiary authorities confiscated the $105.00, and have credited it to the inmate Canteen fund, which is a fund for the benefit of all inmates in the penitentiary.

Section 216.315 provides that no inmate shall have any money or legal tender in his possession. Such money shall be considered contraband under the rules and regulations of the institution. This question was considered and ruled in *Kimble vs. of State of Michigan Corrections Department*, 411 Federal 2nd, 990. The facts in that case were similar to the facts in the present case. The U.S.

Court of Appeals held that the action of the prison officials in seizing money from an inmate and placing it in the inmate general benefit fund was a properly regulated function of the administration of the prison. That decision is controlling in the present case.

The Court finds the issues against the Plaintiff and for the defendant.

IT IS, THEREFORE, ORDERED AND ADJUDGED that Plaintiff's Petition be and the same is hereby dismissed.

/s/ James T. Riley
Circuit Judge

Dated March 22nd, 1974.

IN THE MISSOURI COURT OF APPEALS
KANSAS CITY DISTRICT

KCD 27490

Cir. Ct. #26342

DANIEL A. WILWERDING,
Plaintiff-Appellant

vs

Cole

H. R. SWENSON, WARDEN
Defendant-Respondent

ORDER

(Filed October 10, 1974)

Now at this 7th day of October, 1974, having considered the Motion for Special Order permitting an appeal out of time filed by plaintiff in cause No. 26,342 pending in the Circuit Court of Cole County, the Court finds that due notice of said motion was given the adverse parties, that there is merit in said motion, and that the delay in filing such notice of appeal in regular time was not occasioned by culpable negligence on the part of said plaintiff.

WHEREFORE, the Court sustains said motion and enters its special order permitting said plaintiff to file a notice of appeal within ten (10) days after notification received the Circuit Clerk of Cole County of the issuance of this, the said special order all in accordance with

---

STATE OF MISSOURI, Sct.

I, Mary Louise Thomas, Clerk of the Missouri Court of Appeals, Kansas City District, do hereby certify that the above is a full, true and complete copy of the Order of

this Court entered of record at the September Session, 1974, and on the day of October 1974, in the above cause.

Given under my hand and seal of said Court at Kansas City, Missouri, this 7th day of October, 1974.

/s/ Mary Louise Thomas

(Seal) Clerk

Copy of above mailed to:

Mr. David Robards, Asst. Atty. Gen.

Daniel A. Wilwerding, Reg. #08759

Mr. Richard R. Nacy, Jr., Atty. at Law

IN THE MISSOURI COURT OF APPEALS
KANSAS CITY DISTRICT

KCD 27,490

DANIEL A. WILWERDING,
Appellant,

vs.

H. R. SWENSON,
Warden,
Respondent.

ORDER

NOW on this day the Court being fully advised in the premises does order that plaintiff's motion is sustained as to the waiver of fees and costs on appeal and as to furnishing plaintiff with a transcript; as to the request for appointment of attorney, the ruling is deferred until filing of the transcript, as per Supreme Court Rule 77.04.

/s/ David J. Dixon
David J. Dixon
Chief Judge

Dated: October 7, 1974